REPORT

OF

The Case of the Canadian Prisoners;

WITH

AN INTRODUCTION

ON

THE WRIT OF HABEAS CORPUS.

BY

ALFRED A. FRY, ESQ.,

OF LINCOLN'S INN,

ONE OF THE COUNSEL IN THE CASE.

LONDON:

A. MAXWELL, 32, BELL YARD, LINCOLN'S INN,

Law Bookseller to His Late Majesty.

AND MILLIKEN AND SON, DUBLIN.

MDCCCXXXIX.

LONDON:
BRADBURY AND EVANS, PRINTERS, WHITEFRIARS.

TO

MR. SERGEANT WILDE, M.P.,

THIS REPORT

OF

An Important Constitutional Case,

IS RESPECTFULLY DEDICATED,

NOT ONLY AS A TRIBUTE TO HIS EMINENT FORENSIC TALENTS,

BUT IN GRATEFUL ACKOWLEDGMENT OF HIS MANY KINDNESSES,

PROFESSIONAL AND PERSONAL,

TO HIS ATTACHED FRIEND,

THE AUTHOR.

CHANCERY LANE, *June*, 1839.

LIST OF CASES AND AUTHORITIES

REFERRED TO IN THE INTRODUCTION AND IN THE REPORT.

	PAGE
Bacon's Abridgment	39, 41
Barnes's Case	67, 74
Beeching, exp.	39
Becquet *v.* M'Carthy	50
Blackstone's Commentaries	2, 4, 6, 13, 17, 36, 45, 52
Bracton	5
Bushell's Case	22, 54, 67
Buchanan *v.* Rucker	50
Burge on Colonial Law	48
Chancey's Case	84
Clarke, R. *v.*	40
Ditto	55, 64
Coke's Institutes	37
Crowley's Case	14 to 16, 39, 78
Crosby's Case	37
Darnell's Case	11
De Vine's Case	7, 84
Deybel's Case	56
Dodson's Life of Foster	22, 41, 86
Elliott's Case	13
Entineck *v.* Carrington	45
Elliott *v.* Ogden	49, 59
Glanville	3
Goldswain's Case	87
Hallam's Middle Ages	1, 2, 10
—— Constitutional History	16
Hobart	44, 80
Hobhouse's Case	38, 103
Hottentot Venus, Case of	102
Hutchins *v.* Player	7, 84
Jenkes's Case	14
Kelynge's Reports	46
Kent's Commentaries on American Law	2
Kimberley, R. *v.*	67, 76
Krantz, exp.	70, 76
Leicester, Earl of, *v.* Hayter	72
London, City of, the Case of the	74
Marks, R. *v.*	69, 76
Mead, R. *v.*	48
Nash's Case	56
North's Life of Lord Guildford	47
Parliamentary History	23, 25, 40, 41
Palgrave's Essay on the Privy Council	8

	PAGE
Paty, Queen *v.*	19
Platt, R. *v.*	69, 76
Reeve's English Law	4
Seele's Case	55
Shebbeare, R. *v.*	40
Souden's Case	56
St. John's Case	85
State Trials	6, 10 to 15, 88
Storey's Conflict of Laws	50
Suddis, R. *v.*	65, 75
Swallow's Case	85
Thomlinson's Case	55
Viner's Abridgment	6
White, R. *v.*	86
Wilmot's Judgments and Opinions	22, 40
Wood's Case	22
Woolff *v.* Oxholm	50, 59

PAGE
. . 50
. 65, 75
. . 85
. 55
. . 6
. 86
pinions 22, 40
. 22
. . 50, 59

INTRODUCTION.

THE security for personal liberty afforded by the writ of Habeas Corpus, is, I believe, now unknown in any country but England and America, which has derived it from her parent state. To expect it in Oriental despotisms, would be hoping to gather grapes from thorns and figs from thistles. And in the nations of antiquity, where the democratic form of government would lead us to expect every species of personal security, nothing analogous to it existed. For the truth is, that the rights and feelings of *personality* were merged in the sentiment of *citizenship*. It was, as philosophic historians* have observed, from the forests of Germany that men have derived the idea of *personal independence*. For the infusion of that vigorous principle into the modern codes of Europe, we are indebted to the Barbarians who overran it. It has produced various effects in different countries, according to the modifications of particular circumstances; but we trace its operation throughout all the doctrines of the English law. A jealous anxiety for the security of personal liberty, is one of the proud characteristics of our legal system.

It also distinguished and animated the ancient constitution of Arragon, which was probably better adapted than any other in modern Europe, except our own, to the security of individual freedom†.

* See the 2nd cap. of Guizot's Cours d'Histoire Moderne; and Alison's French Revolution, vol. i. Introduction, p. 16.

† Mr. Hallam, in his valuable work on the "State of Europe during the Middle Ages," (vol. 2, p. 75) explains the peculiar process called *manifestation*, between which and our writ of Habeas Corpus the reader will observe a close analogy:—"To *manifest* any one," says the writer so often quoted [Biancas], "is to wrest him from the hands of the royal officers, that he may not suffer any illegal violence;—not that he is set at

The writ of Habeas Corpus, which is one important mode of effecting that security, has been justly lauded by all constitutional writers, and is considered by Englishmen the bulwark of their freedom. Their attachment to it is well-founded, and they cannot be too wisely jealous in guarding its efficacy in every possible manner. But the inquiring reader will be probably much surprised to find that a writ of so just and wide a celebrity, and of so vitally important a character, has received but a very general notice from our legal writers, although they have been fully alive to its value. For Sir William Blackstone describes it in the following terms*:—"To assert an absolute exemption from imprisonment in all cases is inconsistent with every idea of law and political society, and in the end would destroy all civil liberty, by rendering its protection impossible; but the glory of the English law consists in *clearly defining* the times, the causes, and the extent, when, wherefore, and to what degree, the imprisonment of the subject may be lawful." And Chancellor Kent, in his Commentaries on the American Law†, says of the Habeas Corpus Act (which only confirmed the common law), "that it has always been considered as a stable bulwark of civil liberty, and nothing similar to it can be found in any of the free commonwealths of antiquity. Its excellence consists in the easy, prompt, and efficient remedy afforded for all unlawful imprisonment, and personal liberty is not left to rest for its security upon general and abstract declarations of right."

The information, however, concerning this writ, thus warmly and justly eulogized, is only to be found in scattered parts of various works;

liberty by this process, because the merits of his case are still to be inquired into; but because he is now detained publicly, instead of being as it were concealed; and the charge against him is investigated, not suddenly or with passion, but in calmness and according to law:—therefore this is called manifestation." The power of this writ (if I may apply our term) was such, as he elsewhere asserts, "that it would rescue a man whose neck was in the halter." And in a note, the learned historian quotes a passage from Zurita, explaining the two processes which secured life and property. The first was called *manifestation*, and Zurita says of it, "That it takes place when any one is actually arrested without lawful process; and in such cases only, the justiciary of Arragon, when recourse is had to him, interposes by *manifesting* the person arrested, that is, by taking him into his own hands out of the power of any judge, however high in authority, and this manifestation the justiciary, or his deputies in his absence, are bound to issue at the same instant it is demanded, without further inquiry, and it may be demanded by any one, as attorney of the party requiring to be manifested."

* Comment. vol. iii. p. 133. † Vol. ii. p. 30.

and therefore I have presumed that an attempt to deduce historically its existence and modifications, will not be thought a useless one, although the task must of necessity be performed in a summary manner. I leave to some more laborious successor the duty of thoroughly examining the various topics of technical learning connected with it.

The principle of permitting full liberty to each individual unless restrained by the express judgment of law, is asserted even earlier than in the celebrated clause which forms one of the main provisions of Magna Charta. Thus Glanville (who wrote in the time of Henry II.) describes the mode of proceeding against persons accused of crimes, in the following manner* :—"When any one is charged with the king's death, or with having promoted a sedition, either a certain accuser appears or not. If no certain accuser should appear, but the public voice alone accuse him, then from the first the accused shall be safely attached, *either* by *proper pledges*, or by imprisonment. . . . . If, however, a certain accuser appears in the first instance, security is taken from him to prosecute his plea, and then the party accused is usually attached *by safe and secure pledges, or, if he cannot produce any pledges*, he shall be cast into prison. But in all pleas of felonies, the accused is generally dismissed on pledges, except in a plea of *homicide* ;" in which latter case, he afterwards† says, "persons accused are not discharged unless in compliance with the king's pleasure." Therefore at the common law, as Sir Edward Coke observes‡, "a man accused or indicted of high treason, or of any felony whatever, was bailable upon good security, for at the common law the jail was his pledge or security that could find none ;" and he might have added, "and his only."§ An exception, however, we see is pointed out by Glanville in cases of homicide. But even here, the anxiety of the common law to protect personal liberty was very conspicuous. For to prevent the evils that might arise from the malicious or oppressive use of this power of imprisoning a person by charging him with homicide, the law gave to the accused the privilege of suing out the writ De Odio et Atiâ, which is supposed to have been alluded to by Glanville in the sentence just

* Beames's Translation, p. 314, b. 14, c. i. † Ib. c. 3, pp. 353, 4.

‡ 2 Inst. 189.

§ In Richard II., Act 4, Scene 1., Shakspeare makes Henry IV. say :—

"Lords, you that here are under our arrest,
Procure your *sureties* for your days of answer."

quoted from him, on the discharge by the king's pleasure. The natur
and effect of this writ have been described by Reeves, in his commentary
on the provisions of Magna Charta* :—

De Odio et Atiâ.

"The writ De Odio et Atiâ was rendered more attainable [by Magna Charta] than it had hitherto been. It was ordained that this writ in future should issue gratis, and should never be denied (c. 26). This is the first mention of this writ by name. It was one of the great securities of personal liberty in those days.

"It was a rule that a person committed to custody on a charge of homicide should not be bailed by any other authority than that of the King's writ; but to relieve a person from the misfortune of lying in a prison till the coming of the justices in eyre, this writ used to be directed to the sheriff, commanding him to make inquisition, by the oaths of lawful men, whether the party in question was charged through malice, 'utrum rettatus sit de odio et atiâ;' and if it was found that he was accused de odio et atiâ, and that he was not guilty, or that he did the fact se defendendo, or per infortunium, yet the sheriff by this writ had no authority to bail him; but the party was then to sue a writ of tradas in ballium, directed to the sheriff, whereby he was commanded that if the prisoner found twelve good and lawful men of the county, who would be mainpernors for him, then he should deliver him in bail to those twelve. The writ or inquisition De Odio et Atiâ had a clause in it, nisi indictatus vel appellatus fuerit coram justiciariis ultimo itinerantibus,—so that the inquisition was not in such case to be taken. We see how important it was that this writ should be attainable with as little expense and trouble as possible, to avoid the oppression of malicious prosecutors."

Sir William Blackstone says of this writ†—"That the statute of Gloucester restrained it in the case of killing by misadventure or self-defence; and the statute 28 Edward III. c. 9, *abolished* it in all cases whatsoever; but as the statute 42 Edward III. c. 1 repealed all statutes then in being contrary to the great Charter, Sir Edward Coke is of opinion [2 Inst. 43, 55] that the writ De Odio et Atiâ was thereby revived."

Such was the anxiety with which the common law guarded against undue or malicious invasion of personal liberty; and this anxiety was

felt and ac
not only i
the expres
"Nullus li
tenemento
utlegetur
ibimus, nec
vel per leg
beneficial
the whole
Bracton (
Odio et At
criminosi
lachrymosa
fieri solet i
culpabiles e
vel atiâ. I
The prin
oy succeed
enacts, orda
aken by su
y indictme
anchise, n
nd forejudg
28th Edwar
condition th
nor impris
brought in
An additi
afforded by
"When or
another man
to the Lord
an alias and

* History of the English Law, vol. i. p. 252, c. 5.

† Comment. vol. iii. p. 128.

* Words, ac
† De Coron
‡ Sir Franci
exercised by th
Tribunal, pp. 3

felt and acted upon by the framers of Magna Charta. It is displayed, not only in the provision respecting the writ De Odio et Atiâ, but by the express declaration which has become so justly famous [c. 29]. "Nullus liber homo* capiatur vel imprisonetur, aut disseissetur de libero tenemento suo, vel libertatibus vel liberis consuetudinibus suis, aut utlegetur aut exulet, aut aliquo modo destruatur,—nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum, vel per legem terræ." Well said Sir Edward Coke †, that "this was a beneficial law, and to be construed benignly." Its spirit pervaded the whole law, and animated all the great legal writers. Thus Bracton ‡ (who wrote during this æra), when describing the writ De Odio et Atiâ, says—"Sed cum iniquum est, quod innocentes sicut illi criminosi non sunt, diu inclusi detineantur in carcere, ideo ad lachrymosam querelam parentum et amicorum, de gratiâ domini regis fieri solet inquisitio utrum hujusmodi imprisonati pro morte hominis culpabiles essent de morte illâ ut non, et verum appellati essent de odio vel atiâ. Et breve de hujusmodi injunctione *nulli debet denegari.*"

The principle laid down by Magna Charta was constantly asserted by succeeding statutes, as by the 25th Edward III., c. 4, which enacts, ordains, and establishes, that no man from henceforth shall be taken by suggestion or petition made to the King or his council, but by indictment or course of law; and that no one shall be out of his franchise, nor of his freeholds, unless he be duly brought into answer, and forejudged of the same by the course of law§. And again, by the 28th Edward III., c. 3, it is enacted that no man, of what estate or condition that he be, shall be put out of land or tenement, nor taken, nor imprisoned, nor disinherited, nor put to death, without being brought in answer by due process of the law.

De Homine Replegiando.

An additional security for personal liberty at the common law was afforded by the writ De Homine Replegiando, which is thus described. "When one man conveys away secretly, or keeps in his custody another man against his will, then upon oath made thereof, and a petition to the Lord Chancellor, he will grant a writ of replegiari facias, with an alias and pluries, upon which the sheriff returns an elongatus, and

* Words, according to Chatham, "worth all the classics." † 2 Inst. 47.

‡ De Coronâ, fol. 123, lib. 3, c. 8.

§ Sir Francis Palgrave thinks this act was especially directed against the powers exercised by the King's Council. See his Essay upon the original authority of that Tribunal, pp. 35, 36.

thereupon issues a capias in withernam made by the filazer, and wh
he is thereupon taken, the sheriff cannot take bail for him*."

This was the old writ constantly resorted to in cases of impris
ment, to which the writ De Odio et Atiâ did not apply. It
tedious and circuitous, only reaching the party against whom
was directed, after several processes, through the indirect med
of the sheriff, instead of compelling his personal and immed
obedience to its command. "Besides," Sir William Blackstone s
"this writ is guarded with so many exceptions, that it is not
effectual remedy in numerous instances, especially where the crow
concerned. The incapacity therefore of the remedy to give comp
relief, hath almost entirely annihilated it, and caused a general recc
to be had in behalf of persons aggrieved by illegal imprisonmer
the writ of Habeas Corpus†."

De Nativo Habendo.

The writ correlative to the writ De Homine Replegiando was
writ De Nativo Habendo, which presented the mode by which the
asserted his right to the possession of his villain. This writ has hap
become obsolete with the destruction of the system of domestic sla
with which it was connected. Those who may wish minutely to pu
the learning in relation to it, may consult Mr. Hargrave's celeb
argument in the case of Summerset the negro, where that learned
laborious jurist has collected it with great care and anxiety‡. We
in this country no instance of the writ after the time of James I., w
the system of villainage ceased. But in America, where unhappily
system still continues, that writ is yet in use§.

Habeas Corpus.

The writ of Habeas Corpus is found in operation at a remote peri

* 2 Lilly Practical Reg. 23; Vin. Ab. Homine Repleg. A. vol. xiv. p. 305; a
Fitz. N. B. 152.

† Vol. iii. p. 129, Comment.

‡ State Trials, vol. xx.

§ There was also the writ De Manucaptione Capiendâ, or of "mainprize," as
commonly called, created by the Statute of Westminster 1, c. 15, which, recitin
"Sheriffs and others which have kept in prisons persons detected of felony, and
tinent, have let out such as were not replevisable, and have kept in prison such as
because they would gain of the one party and grieve the other," proceeds to
what persons are to be replevied "under the writ of De Homine Replegiando," s
Edward Coke [2 Inst. 184]. The learning in relation to thiswrit may be be
collected by Lord Nottingham in Jenkes's case. [2 Swanston, p. 85, et seq.
inquiry into its nature is only interesting as a subject of antiquarian research;
Lord Nottingham says, "And now Fitzherbert and my Lord Coke are both
that the statute 28 Edward III. has repealed the writ De Manucaptione Capien
to criminals." See ante, p.

the English law. It was anciently called Corpus cum causâ, from the words of the writ, requiring the party to return not only the body of the person detained, but the cause of the capture and detention. It gradually superseded the old writs De Odio et Atiâ and De Homine Replegiando, probably from its superior efficacy, as a prerogative writ. It required immediate obedience from the party to whom it was directed, and enforced it by attachment.

The earliest reign in which I have been able to trace its frequent appearance, is that of Henry VI. At that period, it seems to have been familiar to, and well understood by, the Judges. Indeed, a most remarkable and important case in connexion with this writ, occurred in that reign; I refer to Vine's case. It is thus correctly* detailed by Sir Orlando Bridgman, in his valuable reports of his judgments, not many years in the possession of the profession†.

De Vine's case.

"In Andrew de Vine's case, 34 H. 6, which I shall have occasion to mention again to prove the custom, an Habeas Corpus issued out of Chancery, directed to the mayor and sheriffs of London, to bring his body before the king in Chancery, it being vacation time. They make a return, 'That it was provided and ordained (ab antiquo) by the mayor, aldermen and commonalty of the said city, according to their laws, ordinances, liberties, and free customs, confirmed by parliament. that none should exercise the trade of a common broker or maker of bargains, non de contractu seu bargando quocunque inter mercatorem et mercator: faciend. tanquam communis abrocator seu mediator se intromitteret, until he were admitted by the mayor and aldermen, &c., and that Andrew de Vine, for his breaking and making of bargains, not being so admitted, he being convicted by his own confession before the lord-mayor and aldermen, was imprisoned.' To this he makes answer; and they reply, and pray that he may be remanded. The Lord Chancellor, by the advice of the two chief justices Fortescue and Prisot, Asheton Justice, and the rest of the justices, and having heard the reasons, evidences, and allegations on both sides, and the charters, liberties, statutes, records and ordinances of the city on that

* I say *correctly*, because I have examined the original record in the *Liber Dunthorne*—a book of great authority, compiled by a Town-clerk of the city of London, of that name, in the reign of Edward IV. and now in the custody of his successors. It contains several charters and cases of importance in relation to the rights and privileges of the Corporation.

† P. 288. In the case of *Hutchins* v. *Player*.

behalf, ex antiquo fact. et approbat., did adjudge that he should remanded in affirmance of the said liberties, statutes, and ordinance."

After this period the existence of the writ of Habeas Corpu distinctly observed, and its progress can be effectively traced. I before the reign of Henry VI., I find myself obscured by a cloud. the year book 48 Edward III., 22, there is a case upon this w or, as it was then called, Corpus cum causâ. And in a book of gr authority, viz. Serjeant Maynard's collection of cases and pleadings the time of Edward II., I find in the index a reference, under the tit of Habeas Corpus, to the head 'Corpus cum causâ,'—but no such tit as that can I discover in the index, nor, after looking through the boo itself, can I find any case upon such a writ.

In Sir Francis Palgrave's curious and interesting "Essay on th original Authority of the King's Council," there are two remarkable c se in the reign of Edward III., of persons brought before that tribun which illustrate this subject. The fi st was in the 10th year of that rei

"Thomas of York sets forth, in his petition addressed to the Chance y that he knows how to make silver, and that he has made it in the presence of good men of London, and the silver was found to be genuine. Now there came one Thomas Crop, of London, grocer, who made h mself intimate with the alchemist, and persuaded him to bring his instruments and his elixir to the house of the said Thomas Crop, wh re he worked. But being thus entrapped, the grocer and his allies k pt the alchemist in duress until he sealed two bonds to the grocer, each in the penalty of a hundred marks. By virtue of these obligatio s the alchemist was arrested and sent to Newgate, whilst the groce possessed himself of his elixir and apparatus, and other goods an chattels, to the mountance of forty pounds: thereupon the sai Thomas prayed that order might be taken for his enlargement; a d that he might be allowed to come with his elixir and apparatus bef re the Chancery, or others whom the king would be pleased to name to prove his science; and that the false obligations might be annulled.

"The chancery could not act upon this bill. The board had no power to issue the commission; and the bill being, therefore, brou ht 'before the king and the great council,' during the sitting of h parliament at Westminster, 10 Edward III., it was then ordered th the mayor of London, Sir Robert de Skarthburgh, and Sir Willi m Scott, or any two of them, should take an inquest of the matters c n

taken therein, and hear and determine the trespass. And if the petitioner found good surety that he would follow his suit without delay, and return to prison in case he should not prove his allegations, then he was to have his writ of mainprize." What further proceedings were had in this case, the learned author does not state.

In the 21 Edward III., in a remarkable case of forcible abduction, the parties were brought before the Privy Council.

"De habendo Margeriam de la Beche coram consilio Regis.

"Rex Johanni de Dalton chivaler, salutem. Quia notorius et scandolosus clamor, ubique in populo habetur, et querimonia gravissima nobis facta est, quod tu una cum aliis de confederacione tua, Margeriam de la Beche, dilecto et fideli nostro Geraldo del Isle, legali matrimonio copulatam, die sanctæ Parasceves ante auroram diei apud monasterium ipsius Margeriæ de Beaumis, juxta Redynges, ubi Leonellus filius noster quam dilectus, Custos Angliæ, tunc moram traxit, temeritate presumptuosa infra virgam Marescalciæ ipsius Custodis, non considerata presencia aut reverencia ipsius Custodis, in Dei et sanctæ Ecclesiæ ac nostri irreverenciam et contemptum, lesionemque pacis nostræ et terrorem dicti Custodis ac aliorum liberorum nostrorum secum commorancium, et totius populi nostri parcium prædictarum, vi armata rapuistis, et eam invitam quo volueras, abduxisti. Nos volentes super hujusmodi attemptatis, tam horridis et injuriosis, remedium congruum apponi prout decet, tibi, sub forisfactura vitæ et membrorum et omnium aliorum quæ nobis forisfacere poteris, precipimus firmiter injungentes, quod dictam chargeriam habeas absque conculcacione corporis sui, coram prefato Custode et consilio nostro apud Westmonasterium cum omni festinacione qua poteris. Ita quod tu et ipsa sitis ibidem die Mercurii proximo post instantem quindenam Paschæ ad ultimum, ad faciendum et recipiendum quod ibidem super hoc tunc contigerit ordinari. Et hoc sicut forisfacturam prædictam evitare volueris, nullatenus omittas.

"Teste custode, &c. apud Redyng, xxxi. die Marcii.—Per ipsum custodem et consilium." *

The research for a higher origin than the time of Henry VI., is unnecessary. The investigation may amuse antiquarians,—it cannot materially assist a constitutional lawyer, and is quite needless for the practical security of the liberty of the subjects of Great Britain.

The writ of Habeas Corpus was, in its early history, used between

* Rot. Claus, 21 Edward III. p. 1, m. 21 d.

subject and subject, the one detained invoking the power of the so reign to interpose and protect him from the unwarrantable interfere of a fellow-subject. At what period it first began to be used *agai the crown*, it is difficult perhaps to say. In the great case of Sir Thon Darnell's case. Darnell and others,* in the reign of Charles I., the first case in wh the nature of the writ of Habeas Corpus appears to have been thoroug discussed, and which eventually produced, indeed, the Petition of Rig its use, as a means of asserting the liberty of the subject against crown, was distinctly felt and asserted. Thus, Sergeant Bramston, his argument for the prisoner, says expressly—"This writ is the me and the only means that the subject hath, in this and such like cases obtain his liberty; there are other writs by which men are delive from restraint, as that De Homine Replegiando, but extends not to t cause, for it is particularly excepted in the body of the writ De Ma captione et de Cautione Admittenda, but they lie in other cases—t the writ of Habeas Corpus is the only means the subject hath to obta his liberty, and the end of this writ is to return the cause of the i prisonment, that it may be examined in this court, whether the par ought to be discharged or not."† The earliest precedents I find ci in that case, where the subject sued the writ against the crown, are the reign of Henry VII.;‡ afterwards it became pretty frequent, an the time of Charles I. was held a n admitted constitutional remedy. I ha just observed that the great case in that reign, of Sir Thomas Darne and others, was the first in which the nature of this great writ of Habe Corpus appears to have been fully discussed; and it therefore dema attention. Sir Thomas Darnell, Sir John Corbet, Sir John Heverin ham, and Sir Edmund Hampden, were committed to the Fleet by order of the council board, in the third year of Charles I., for refusi to contribute to the general loan demanded by the king.§ Th obtained a writ of Habeas Corpus to bring them before the Cour King's Bench, and the warden returned, that they had been commi to him, and were detained by virtue of a warrant of the Privy Counc which stated that they were committed by the special command [per specia

* 3 State Trials, p. 1. † Ib. p. 6.

‡ Mr. Hallam (Middle Ages, vol. ii. p. 72) says, "There is, I believe, no record instance of a habeas corpus granted, in any case of illegal imprisonment by the crow or its officers, during the continuance of the Plantagenet dynasty."

§ State Trials, vol. 3, p. 1. See also Hume's Hist. vol. 6, p. 164.

mandatum] of his majesty. On behalf of the prisoners, it was objected by their counsel (Sergeant Bramston, Noy, Selden, and Calthorp) that the return was not sufficient in alleging merely a detention by "special commandment" of the king, without showing the nature of the commandment, or the cause whereupon the commitment is grounded,—for that the imprisonment of the subject without cause shown, but only by the commandment of the king, is not warrantable by the laws and statutes of this realm. This great constitutional principle is urged with all that energy and learning which might be expected from the well-known love of liberty and vast resources of legal knowledge, which characterised two, at least, of the counsel for the prisoners. As might, perhaps, equally be expected, the judges of that day (who upheld Ship-money) decided that the return was good, and remanded the prisoners. This case produced the Petition of Right; for in a few months after its adjudication, a parliament was summoned by the king, and their earliest proceedings were directed to the consideration of the measures adopted by the crown in reference to the forced loans, and the imprisonment of those who had refused contribution towards them. Among those who urged the complaint, are to be found the two celebrated names of Sir Thomas Wentworth and Sir Edward Coke. This last-named veteran champion of the law and liberty of the subject, deserves immortality for the following spirited speech in the House of Commons, upon this matter:

> I am not able to fly at all grievances, but only at loans. Let us flatter ourselves; who will give subsidies, if the king may impose it he will? The king cannot tax any by way of loans; I differ in those who would have this of loans go amongst grievances:—but would have it go alone. I will begin with a noble record, it cheers to think of it, 25 Edward III.; it is worthy to be written in letters of gold. Loans against the will of the subject are against reason and franchise of the land, and they desire restitution. It is against the franchise of the land for freemen to be taxed but by their consent in parliament." A day or two afterwards, the House "resolved itself into a committee for taking into consideration the liberty of the subject in his person and in his goods, and also to take into consideration his majesty's supply."* And the particular instance of grievance in the liberty of the subject, was the case of Sir John Heveringham and those

* State Trials, vol. iii. p. 63.

other gentlemen who were imprisoned about loan money, and thereupon had brought their Habeas Corpus, had their case argued, and were nevertheless remanded to prison, and a judgment, as it was then said was entered.* Here again Sir Edward Coke was foremost in condemnation of this judgment, and was supported by Selden. After a debate which lasted three days, the House of Commons resolved—"1st. That no freeman ought to be detained or kept in prison, or otherwise restrained by the command of the king or Privy Council, or any other, unless some cause of the commitment, detainer, or restraint, be expressed, for which by law, he ought to be committed, detained, or restrained.—2d. That the writ of Habeas Corpus may not be denied, but ought to be granted to any man that is committed or detained in prison, or otherwise restrained, though it be by the command of the king, the Privy Council, or any other, he praying for the same.—3rd. That if a freeman be committed or detained in prison, or otherwise restrained by the command of the king, the Privy Council, or any other, no cause of such commitment, detainer, or restraint, being expressed, for which, by law, he ought to be committed, detained, or restrained, and the same be returnable upon a Habeas Corpus, granted for the said party, then he ought to be delivered or bailed." Upon these resolutions took place a memorable conference with the Lords, managed on behalf of the Commons by Sir Dudley Digges, Mr. Littleton, Selden, and Coke. Their arguments may be seen in the State Trials,† as also those of the attorney-general and others, on behalf of the crown. The House of Lords called for the opinions of the Judges. After several further conferences and debates at last the Petition of Right became the law of the land, and was passed
3 Car. c. 1. into the statute of 3 Car. I., c. 1. This justly celebrated act, among other things, after reciting Magna Charta, and the 28 Edward III. c. 3,‡ and that, nevertheless, "against the tenor of the said statutes and other the good laws and statutes of your realm, to that end provided, divers of your subjects have of late been imprisoned without any cause shown, and when, for their deliverance, they were brought before your justices by your majesty's writs of Habeas Corpus, there to undergo and receive as the court should order, and their keepers commanded to certify the causes of their detainer, no cause was certified, but that they were detained by your majesty's special command, signified by the lords

* State Trials, vol. 3. p. 68. † Ibid, p. 83, et seq. ‡ Supra, p. 5.

your privy council, and yet were returned back to several prisons, without being charged with anything to which they might make answer according to the law,—enacts, (inter alia) that no freeman, in any such manner as is before-mentioned, be imprisoned or detained."

Two years after the statute, the remarkable case occurred, commonly called Sir John Elliott's case*. Sir John, William Stroud, Esq., Walter Long, Esq., and John Selden, were apprehended under warrants from the King, stating that they were committed by the Privy Council for notable contempts committed against himself and his government, and for stirring up sedition. The real cause of this commitment was the freedom of their speeches in Parliament. It was objected, on behalf of the prisoners, when brought up by Habeas Corpus, that this warrant was too general, for that the contempts ought to have been specified. The judges thought that by the law the prisoners ought to be bailed, giving security for their good behaviour, but as they refused to do so, they were remanded to prison. Sir John Elliott, Denzil Hollis, and Benjamin Valentine, were afterwards tried on an information for uttering seditious speeches in Parliament, and judgment was given against them. The House of Commons, however, afterwards declared both judgments illegal, and voted large sums in compensation to Selden, Sir John Elliott, and others, who had been so illegally imprisoned. And in the reign of Charles II., on the motion of that upright constitutional judge, Sir John, then Mr. Vaughan, the House of Commons repeated its resolution that the judgment on the information against Sir John Elliott, Denzil Hollis, and Benjamin Valentine, was an illegal judgment, and against the freedom and privileges of Parliament. "In Selden's case, the judges (says Sir William Blackstone †) delayed for two terms (including also the long vacation) to deliver an opinion how far the charge against him was bailable. And when at length they agreed that it was, they however annexed a condition of finding sureties for good behaviour, which still protracted their imprisonment, the Chief Justice, Sir N. Hyde, declaring that if they were again remanded for that cause, perhaps the Court would not afterwards grant a Habeas Corpus, being already made acquainted with the cause of the imprisonment. But this was heard with indignation and astonishment by

Sir John Elliott's case.

* 3 State Trials, p. 235. † Comment., v. 3, p. 138.

every lawyer present, according to Mr. Selden's own account of the matter, whose resentment was not cooled at the distance of twenty-five years. These pitiful evasions gave rise to the statute 16 Car. I. c. 10. s. 8, whereby it is enacted that if any person be committed by the King himself in person, or by his Privy Council, or by any of the members thereof, he shall have granted to him, without any delay upon any pretence whatever, a writ of Habeas Corpus, upon demand or motion made to the Court of King's Bench or Common Pleas, who shall thereupon, within three court days after the return is made, examine and determine the legality of such commitment, and do what to justice shall appertain, in delivering, bailing, or remanding such prisoner."

The jealousy of Parliament on this subject at this period, is everywhere observable. I find it to be one of the articles of impeachment against Lord Strafford, that "he the said Earl [being President of the King's Council in the northern parts of England] did advise counsel, and procure, further direction to be given, that no prohibition be granted at all but in cases where the Council shall exceed the limits of the [recited] instructions; *and that if any writ of Habeas Corpus be granted*, the party be not discharged till the party perform the decree and order of the said Council*."

Jenkes's case.

The next important case to which history points our attention on this subject, is that of Jenkes, which having been long, though it would seem erroneously, supposed to have materially contributed to the passing of the Habeas Corpus Act, has been ever one of considerable interest and on which the industry of Lord Eldon, in his judgment in Crowley's case†, has thrown much new light.

Jenkes was a liveryman of the city of London; and at a public meeting in the Guildhall in the year 1676, after stating what he conceived to be great public grievances, concluded by moving that the lord-mayor and aldermen should convene a common council for the purpose especially of petitioning the king to summon a new parliament. For this presumption (as the undoubted right of a freeman was held in those inauspicious days) he was brought before the Privy Council, and after an examination in which he conducted himself with great spirit‡,

* State Trials, vol iii. p. 1388. † 2 Swanston, p. 1.

‡ See the State Trials, vol. 6, p. 1192.

committed to prison. With some difficulty he obtained a copy of the warrant under which he was confined,—which purported to be issued by the Privy Council, and charged him with moving "in a most seditious and mutinous manner" that the Common Council might "be convened to petition the king to call a new parliament." He then applied to the lord chancellor Nottingham for a writ of Habeas Corpus, and the report of what took place on the occasion of his application is as follows* :—

"At first his lordship did seem much surprised, and did refuse to hear his counsel; but after a little pause, his lordship bade Mr. Jenkes's counsel to move it again the next seal, and ordered the seal to be put off from Tuesday the 4th until Thursday the 6th of July. Upon Wednesday the 5th of July, Mr. Jenkes's friends waited upon Mr. Secretary Williamson, and desired him, according to his promise, to move in council, that Mr. Jenkes might be bailed: but he said he had spoke with the king, and could do nothing without a petition. So, upon Thursday the 6th of July, being a public seal, Mr. Jenkes's counsel did again move the Lord Chancellor (according to his lordship's order), and asserted the authority of the lord Coke, who is most clear in the case. 2 part Inst. fol. 53, speaking of the writ of Habeas Corpus in the King's Bench, he saith, 'The like writ is to be granted out of the Chancery, either in term (as in the King's Bench) or in the vacation; for the Court of Chancery is officina justitiæ, and is ever opened, and never adjourned: so as the subject, being wrongfully imprisoned, may have justice for the liberty of his person, as well in the vacation time as in term.' And in the 4th Inst. fol. 88, speaking of the Court of Chancery, he saith, 'And this court is the rather always open, for that if a man be wrongfully imprisoned in the vacation, the Lord Chancellor may grant an Habeas Corpus, and do him justice according to law;' vid. 4 Inst., fol. 182, 190. Thus the lord Coke. Mr Jenkes's counsel did likewise offer a precedent or two: but the Lord Chancellor made light of the lord Coke's opinion, saying 'The lord Coke was not infallible:' and slighting all that Mr. Jenkes's counsel had offered, overruled the matter, denying to grant the writ."

Jenkes afterwards applied to the sessions at Westminster to be

* Ib. p. 1197. It must be observed that this report purports to be published "by the friends" of Jenkes. Lord Eldon, however, thought the report in the main correct. 2 Swanston, p. 43.

brought up for trial or to be bailed, but the court refused his application. And subsequently some of his friends petitioned the Lord Chancellor to bail him,* but with no better effect. He then prayed the privy council to let him out on bail, but again he was unsuccessful. At length finally, in the ensuing term, on moving the lord chief justice of the King's Bench for a writ of Habeas Corpus, he was bailed.

The ground on which lord Nottingham (evidently acting on political motives) refused the writ, viz. that it could not issue from Chancery in vacation, was expressly overruled by lord Eldon in Crowley's case, wherein his lordship critically examines the reasons adduced by lord Nottingham in support of his position.†

I must refer the reader to a perusal of Lord Eldon's judgment on the subject, as my object is to present an historical, and not a minutely technical, view of the writ of Habeas Corpus. Lord Eldon had procured possession of the MSS. of lord Nottingham, and therefore he was enabled to speak authoritatively of the grounds on which the Chancellor had acted.

Habeas Corpus Act.

This case of Jenkes has been generally thought to have produced the celebrated statute of the 31st Car. II. c. 3, commonly called the Habeas Corpus Act. Sir Wm. Blackstone expressly states it to have done so. Alluding to it, he says, "The oppression of an obscure individual gave birth to the famous Habeas Corpus Act."‡ But Mr. Hallam tells us that this impression is erroneous. He observes§ "Jenkes's case has been commonly said to have produced the famous Act of Habeas Corpus. But this is not truly stated. The arbitrary proceedings of lord Clarendon were what really gave rise to it‖. A bill to prevent the refusal of the writ of Habeas Corpus was brought into the House on April 10, 1668, but did not pass the committee.

* See 2 Swanston, p. 85, et seq. for an account from Lord Nottingham's MSS. his reasons for not granting Jenkes a writ of main-prize.

† In the case of the Canadians (of which the Report follows this Introduction) a preliminary objection was taken by the Attorney-General, that the writ issued by Mr. Justice Littledale had improvidently emanated, as there was no jurisdiction in the judges to issue writs of Habeas Corpus in vacation at common law. The Court of Queen's Bench, however, was unanimously of opinion, that such a power did exist, grounding themselves on the evil that would result if the subject could be detained in prison during the long vacation without this remedy, and on the distinct opinion of the judges, delivered to that effect in 1758. See report, post., p. 40.

‡ 3 vol. p. 135-6.

§ Constitutional Hist., v. 3, p. 15.

‖ It was one of the articles of his Impeachment that he had caused many persons to be imprisoned against law.

that session. But another to the same purpose, probably more remedial, was sent up to the Lords in March 1669, 70. It failed of success in the Upper House, but the Commons continued to repeat their struggle for this important measure, and in the session of 1673-4 passed two bills, one to prevent the imprisonment of the subject in gaols beyond the seas, another to give a more expeditious use of the writ of Habeas Corpus in criminal matters. The same or similar bills appear to have gone up to the Lords in 1675. It was not till 1676, that the delay of Jenkes's Habeas Corpus took place. And this affair seems to have had so trifling an influence that these bills were not revived for the next two years, notwithstanding the tempests that agitated the House during that period. But in the short parliament of 1679, they appear to have been consolidated into one; and that, having met with better success among the Lords, passed into a statute, and is generally denominated the Habeas Corpus Act." "It is a very common mistake," adds Mr. Hallam, "and that not only among foreigners, but many from whom some knowledge of our constitutional laws might be expected, to suppose that this statute of Car. II. enlarged in a great degree our liberties, and forms a sort of epoch in their history. But though a very beneficial enactment, and eminently remedial in many cases of illegal imprisonment, it introduced no new principle, nor conferred any right upon the subject."

The general provisions of that celebrated statute have been well summed up by Sir Wm. Blackstone; and in order to present a complete view of the subject, I shall insert his statement.*

"The statute itself enacts,—

1. That on complaint and request in writing, by or on behalf of any person committed and charged with any crime, (unless committed for treason or felony, expressed in the warrant; or as accessory, or on suspicion of being accessory, before the fact, to any petit-treason or felony; or on suspicion of such petit-treason or felony, plainly expressed in the warrant; or unless he is convicted or charged in execution by legal process), the Lord Chancellor, or any of the twelve judges, in vacation, upon viewing a copy of the warrant, or affidavit that a copy is denied, shall (unless the party has neglected for two terms to apply to any court for his enlargement) award a Habeas Corpus for such prisoner, returnable immediately before himself or any other of the

* Comm., vol. 3, p. 136.

judges; and upon the return made shall discharge the party, if baila... upon giving security to appear and answer to the accusation in... proper court of judicature.—2. That such writs shall be indorse... granted in pursuance of this act, and signed by the person awar... them.—3. That the writ shall be returned, and the prisoner bro... up, within a limited time, according to the distance, not exceedin... any case twenty days.—4. That officers and keepers neglecting... make due returns, or not delivering to the prisoner, or his agent, wit... six hours after demand, a copy of the warrant of commitment,... shifting the custody of a prisoner from one to another, wit... sufficient reason or authority, (specified in the act,) shall for the fi... offence forfeit £100, and for the second offence £200, to the p... grieved, and be disabled to hold his office. 5. That no person... delivered by Habeas Corpus, shall be recommitted for the same offe... on penalty of £500.—6. That every person committed for treaso... felony shall, if he requires it, the first week of the next term, o... first day of the next session of oyer and terminer, be indicted in... term or session, or else admitted to bail; unless the king's witn... cannot be produced at that time: and if acquitted, or if not indicte... tried in the second term or session, he shall be discharged from... imprisonment for such imputed offence: but that no person, afte... assizes shall be open for the county in which he is detained, sha... removed by Habeas Corpus, till after the assizes are ended; but... be left to the justice of the judges of assize.—7. That any such pri... may move for and obtain his Habeas Corpus, as well out of the Cha... or Exchequer, as out of the King's Bench or Common Pleas; and... Lord Chancellor or judges denying the same, on sight of the war... or oath that the same is refused, shall forfeit severally to the p... grieved the sum of £500.—8. That this writ of Habeas Corpus... run into the counties palatinate, cinque ports, and other privil... places, and the islands of Jersey and Guernsey.—9. That no inhab... of England (except persons contracting, or convicts praying, ... transported, or having committed some capital offence in the pla... which they are sent) shall be sent prisoner to Scotland, Ireland, Je... Guernsey, or any places beyond the seas, within or without the k... dominions, on pain that the party committing, his advisers, aiders... assistants, shall forfeit to the party aggrieved a sum not less than £... to be recovered with treble costs; shall be disabled to bear any ...

of trust ... incapabl... The ... writ was, ... debated ... last invo... which w... afterward... controver... v. White ... revived b... Court of ... Commons ... Ashby ... the const... refusing t... (Powell, ... distinct op... however, ... given for ... this case i... by Mr. G... furious ... between th... the latter ... vindicating ... decision of ... elections, ... and the H... judgment. ... Holt, and ... White ... denunciati... execution, ... new action ... The Hous...

* 2 Lord ...

of trust or profit; shall incur the penalties of præmunire, and shall be incapable of the king's pardon."

The next point of interest which arose in relation to this valuable writ was, whether a Writ of Error lay upon it. The question was debated with great carnestness and even acrimony. Indeed, it at last involved the Houses of Lords and Commons in a collision, which was only terminated by the Queen's proroguing, and shortly afterwards dissolving the Parliament. The case out of which the controversy arose, was one of great interest at the time, (Ashby *v.* White *), and its importance and interest have been very recently revived by the cause of Stockdale *v* Hansard, now depending in the Court of Queen's Bench, and by the proceedings of the House of Commons in relation to this last-mentioned action. Writ of Error on a Habeas Corpus.

Ashby was a burgess of Aylesbury, and brought an action against the constables who were the returning officers of that borough, for refusing to take his vote at the election. It was held by three judges (Powell, Powys, and Gould) that the action would not lie, against the distinct opinion of Lord Holt. The judgment of the Queen's Bench, however, was afterwards reversed by the House of Lords, and judgment given for the plaintiff, by fifty Lords against sixteen. In a note to this case in the excellent recent edition of Lord Raymond's Reports, by Mr. Gale, that gentleman has summarily given the history of the "furious controversy to which the reversal of this judgment gave rise between the Lords and Commons, which was conducted on the part of the latter with great asperity." The Commons passed resolutions, vindicating their privileges, which they conceived invaded by the decision of the House of Lords in favour of an action in relation to elections, which they held to be under their exclusive cognizance; and the House of Lords passed counter-resolutions in support of their judgment. An admirable report to that effect was drawn up by Lord Holt, and published throughout the kingdom.

White† and the other defendants, who, notwithstanding the denunciations of vengeance by the Commons, had been taken in execution, petitioned that House for relief and for protection in five new actions which had been brought against them by Paty and others. The House resolved, that the taking in execution, and the bringing

* 2 Lord Raymond, p. 938. † Gale's Lord Raymond, vol. 2, p. 958, note.

the actions, were a contravention of their late resolutions, and a br of their privileges. By order of the House, Mr. Mead (Ash attorney), John Paty, John Oviatt, John Peyton, jun., Henry Ba and Daniel Horn, the plaintiffs in the above-mentioned actions, w taken into custody by the Sergeant-at-arms, and sent to Newg Paty sued out a writ of Habeas Corpus directed to the keepe Newgate, who returned the warrant of commitment by the Spea On argument, Powell, Powys, and Gould, justices, in opposition to H chief justice, held that the Court could not discharge him. Upon this cision, Paty proposed to bring a writ of error. The Commons addre the Queen, requesting her not to grant any writ of error in this c Her Majesty replied, 'That as this matter affected the cours judicial proceedings, it was of the highest importance: and there her Majesty thought it necessary to weigh, and consider very caref what was proper for her to do in a thing of so great concern.'

"The Commons, enraged at the attempts to oppose their autho resolved, 'That Mr. Montague, Mr. Lechmere, Mr. Denton, and Page, who had been counsel for the prisoners in the argument upon return to the writ of Habeas Corpus, were guilty of a breach of privile and the Sergeant-at-arms was ordered to take them in custody

"The Sergeant apprehended Mr. Montague and Mr. Den notwithstanding they had a protection from the Lords; and infor the House, 'That he had also like to have taken Mr. Nich Lechmere, but that he got out of his chambers in the Temple, pair of stairs high, at the back window, by the help of his sh and a rope.'

"Mr. Cesar, one of the cursitors, was ordered into custody. having neglected to inform the House what writs of error had applied for.

"The Lords, on taking into consideration the petition of prisoners, resolved, having previously received the opinion of te the judges, that a writ of error is ex debito justitiæ, except in tre or felony." . . . . . The Lords then passed several o resolutions in support of Ashby's right to maintain his action; lastly, 6th, That a writ of error is not a writ of grace, but of ri and ought not to be denied to the subject, when duly applied though at the request of either House of Parliament—the d thereof being an obstruction of justice, contrary to Magna Charta.

"These* resolutions, the Lords, in a conference, communicated to the Commons, who took till 7th March to consider of them. The Sergeant-at-arms informed the Commons that he had been served with writs of Habeas Corpus for Mr. Montague and Mr. Denton."

Upon this the House resolved, "That no Commoner of England, committed by the House of Commons for breach of privilege or contempt of the House, ought to be, by any writ of Habeas Corpus, made to appear in any other place, or before any other judicature, during that Session of Parliament wherein such person is so committed.

"That the Sergeant-at-arms attending this House do make no return of, or yield any obedience to, the said writs of Habeas Corpus; and, for such his refusal, that he have the protection of the Commons.

"A second conference took place between the two Houses, which was broken up on an allusion being made by the Commons to what they called a usurpation by the Lords of an appellate jurisdiction in cases of equity.

"The Lords insisted on their resolutions, and agreed on a representation and address to the Queen, praying her to grant writs of error the Aylesbury men.

"The Queen replied, *that she would have granted the writs of error desired*, but that she found it necessary immediately to prorogue the Parliament, and that therefore there could have been no further proceeding upon them.

"A prorogation, followed by a dissolution, brought to a close the discussion of this question and a very stormy session."

The question therefore of whether a writ of error lay to the Lords was not decided; and, strange to say, I am not aware of any case, during the long interval that has elapsed, in which it has been again raised. I presume, however, that in these days no doubt would be entertained as to the writ of error lying. The proceedings are *on record*, and do not seem distinguishable in principle from other cases. It appears that the Commons raised the general question in their conference with the Lords, and did not confine themselves to that particular case as an infringement of their exclusive right to judge of their own privileges, by making the Lords a court of appeal upon them. [See Parl. Hist. vol. 6, p. 401.] Ten Judges agreed that in civil matters a petition for

* Gale, ubi supra.

a writ of error was of right and not of grace. And the Queen informed the Lords "that *she would have granted* the writs."—[Parl. Hist. vol. 6, p. 382.—Note.]

All the superior courts of co-ordinate jurisdiction over writ of Habeas Corpus.

We find nothing of peculiar historical or constitutional interest on this subject from that period till the year 1758. The only topic deserving of notice in the interval is the establishment of the doctrine, that the Courts of Common Pleas and Exchequer had a co-ordinate jurisdiction with the King's Bench in issuing the writ. It was originally thought, and even so late as the time of Charles II., that the Court of Common Pleas could only proceed against a party under this writ if he were amenable to its jurisdiction as an officer, and that the only mode of proceeding was by a writ of privilege; but this notion was overruled in Bushel's case (Sir T. Jones 13, and Vaughan 135) and Jones's case, 2 Mod. 198, and finally the power of the Court was distinctly asserted in Wood's case, 2 Sir William Blackstone, 745, 2 Wilson, 172. Since which time the Courts of Westminster Hall have all exercised a coequal jurisdiction over the writ of Habeas Corpus.

1758. Cases of impressed men.

In 1758 some important discussions arose with respect to the power of this writ at common law. Several persons in the Savoy, impressed under the 29th Geo. II. c. 4, had applied to Mr. Justice Foster for writs of Habeas Corpus, upon which they were brought up and discharged by consent, without any return being made; but the learned judge, conceiving it to be a matter of doubt and consequence how to proceed in such cases under the act, desired the assistance of the other judges of the King's Bench. They all met accordingly, and the result of their deliberation will be found reported by Sir Eardley Wilmot*. In Dodson's Life of Mr. Justice Foster†, there is a full account of that learned judge's views on an important question raised during these proceedings. His statement of the matter is as follows:—"It appears by his note-book, that in that term motions were made to the Court for several writs of Habeas Corpus in favour of men impressed for soldiers under the statute 29 Geo. II. c. 4, upon affidavits intended to show the men not to be within the description of the statute; that the Court, instead of granting the writs, made rules for showing cause why the writs should not go, for notice to be given to the solicitor of the Treasury, and for the keeper of the Savoy not

* See Wilmot's Judgments and Opinions, p. 81, note (*a*).

† And see State Trials, vol. 20, p. 1375.

suffer them to be removed in the mean time; and that afterwards, in the same term, the men were discharged by the Court with the consent of Mr. Solicitor-General Yorke. These cases are severally entitled the King against Hayward; and in these, Mr. Justice Foster expressed his sentiments concerning the writ of Habeas Corpus, and in particular declared it to be his opinion, that the return to the writ is not in all cases conclusive to the Court or to the parties, but that men wrongfully impressed into the public service by sea or land, are by law entitled to, and ought to have, an easier and speedier remedy than an action for a false return, which may afford to them not the least relief."

The public attention having been drawn by these cases to what seemed a great defect in the Habeas Corpus Act, a bill was brought into parliament to amend the statute in several particulars, which passed the House of Commons, but was rejected in the Lords.* A very correct and interesting account of the proceedings in relation to it, will be found in the recent edition of Bacon's Abridgment, by Messrs. Gwillim and Dodd.† The learned editors show that the bill "imported that the several provisions made in the act of 31 Car. II., for the regarding of writs of Habeas Corpus, in cases of commitment or detainer for any criminal or supposed criminal matter, should in like manner extend to all cases where any person not being committed or detained for any criminal or supposed criminal matter, should be confined, or restrained of his or their liberty, under any colour or pretence whatsoever; that upon oath, made by such person so confined or restrained, or by any other person on his behalf, of any actual confinement or restraint, and that such confinement or restraint, to the best of the knowledge and belief of the person so applying, was not by virtue of any commitment or detainer for any criminal or supposed criminal matter; an Habeas Corpus directed to the person or persons so confining or restraining the party, should be granted in the same manner as is directed, and under the same penalties as are provided by the said act in the case of persons committed or detained for any criminal or supposed criminal matter; that the person before whom the party should be brought by virtue of an Habeas Corpus, granted in the vacation time, under the authority of this act, might and should, within three days

* See the debate there and proceedings upon it. Parliamentary Hist., vol. 15 p. 998.

† Vol. 4, p. 140, Habeas Corpus B.

after the return made, proceed to examine into the facts contained in such return, and into the cause of such confinement or restraint, and thereupon either discharge, or bail, or remand the party so brought, as the case should require, and as to justice should appertain. The rest of the bill related to the return of the writ in three days, and the penalties upon those who should neglect or refuse to make the return, or to comply with any other clause of this regulation.

"The bill was soon passed by the Commons; but in the House of Lords it was thrown out at the second reading, and the judges were ordered to prepare a bill to extend the power of granting writs of Habeas Corpus ad subjiciendum in vacation time, in cases not within the statute of 31 Car. II. c. 2, to all the judges of his Majesty's courts at Westminster, and to provide for the issuing of process in vacation time, to compel obedience to such writs; and that in preparing such bill they take into consideration, whether in any and what cases it may be proper to make provision, that the truth of the facts contained in the return to a writ of Habeas Corpus may be controverted by affidavits or traverse, and so far as it shall appear to be proper, that clauses be inserted for that purpose, and that they lay such bill before the House in the beginning of the next session of parliament. A bill to this effect was accordingly prepared by the judges, but the House never called for it. See a copy of it in Dodson's Life of Sir Michael Foster, p. 68.

"When the above bill was before the Lords, the following questions were proposed to the judges:—1st. Whether, in cases not within the act of 31 Car. II. c. 2, writs of Habeas Corpus ad subjiciendum, by the law as it now stands, ought to issue of course, or upon probable cause verified by affidavit?—2nd. Whether, in cases not within the said act, such writs of Habeas Corpus, by the law as it now stands, may issue in vacation by fiat from a judge of the Court of King's Bench, returnable before himself?—3rd. What effect will the several provisions proposed by this bill, as to the awarding, returning, and proceeding upon returns to such writs of Habeas Corpus, have in practice? and how much will the same operate to the benefit or prejudice of the subject?—4th. Whether at the common law, and before the statute of Habeas Corpus in the 31st of king Charles II., any, and which of the judges could regularly issue a writ of Habeas Corpus ad subjiciendum in time of vacation, in all, or in what cases particularly?—5th. Whether

judges at the common law, and before the said statute, were bound to issue such writ of Habeas Corpus in time of vacation, upon the demand of any person, under any restraint? or might they refuse to amend such writ if they thought proper?—6th. Whether the judges at the common law, and before the said statute, were bound to make such writs issued in time of vacation, returnable immediate? and could they enforce obedience to such writ issued in time of vacation, if the party served there with should neglect or refuse to obey the same, and by what means?—7th. Whether, if a judge, before the said statute, should have refused to grant the said writ on the demand of any person under any restraint, had the subject any remedy at law, by action or otherwise, against the judge for such refusal?—8th. Whether, in case a writ of Habeas Corpus ad subjiciendum at common law, be directed to any person returnable immediate, such person may not stand out an alias and pluries Habeas Corpus, before due obedience thereto can be regularly enforced by the course of the common law?—9th. Whether the said statute of 31 Car. II., and the several provisions therein made for the immediate awarding and returning the writ of Habeas Corpus, extend to the case of any compelled against his will, in time of peace, either into the land or sea service, without any colour of legal authority, or to any case of imprisonment, detainer, or restraint whatsoever, except cases of commitment or detainer for criminal or supposed criminal matters?—10th. Whether, in all cases whatsoever, the judges are so bound by the facts set forth in the return to the writ of Habeas Corpus, that they cannot discharge the person brought before them, although it should appear most manifestly to the judges, by the clearest and most undoubted proof, that such return is false in fact, and that the person so brought up is restrained of his liberty by the most unwarrantable means, and in direct violation of law and justice?—The third question was waived at the request of the judges. Upon the first question, they all delivered their opinions in the very same words—'That in cases not within the act of 31 Car. II., writs of Habeas Corpus ad subjiciendum, by the law as it now stands, ought not to issue of course, but upon probable cause verified by affidavit.'" Upon the other questions they were divided—and their opinions may be seen at length in the work from which the foregoing quotation has been made.* It would occupy too much of the limits of this Introduction to extract them; and the

* See also Parliamentary Hist., vol. 15, p. 898, et seq.

reader must be, therefore, thus summarily referred to them. The reasons of one of these learned judges, Sir E. Wilmot, may be seen minutely detailed by him in his valuable collection of "His Opinions and Judgments," p. 77.

The learned Editors to whom I have before referred, add, "Though it was now seen that there was a material difference of opinion among the judges upon these great constitutional points, though the defects in the law were fully exposed, and the Lords, while they rejected the measure then before them, acknowledged the necessity of a further legislative enactment to supply those defects, by their direction to the judges to prepare a bill for that purpose; yet the effect of the discussion was short and transient. No notice was taken in the following session of the bill which the judges had prepared, nor was the subject in any the slightest manner touched upon. All that had passed seemed to have at once sunk into oblivion; the law, as it stood, was acquiesced in, as fully adequate to the public security; Mr. Justice Blackstone, in considering the statute of the 31st of King Charles II., in his Commentaries, published only a few years afterwards, asserts (book iii. c. 8) that "the remedy is now complete for removing the injury of unjust and illegal confinement."

56 G. 3, c. 100.

The next epoch of historical interest in relation to the writ of Habeas Corpus is the year 1816, when the statute 56 Geo. III. c. 100, passed, commonly called, after its author, Mr. Sergeant Onslow's Act. "When it was first brought under the consideration of parliament it was rejected. It passed, as the Act of Charles had done, through the Lower House without difficulty; but it met with so strong an opposition in the other House, particularly from the two great law lords, the Chancellor and the Chief Justice of the King's Bench, the one declaring it to be unnecessary, and the other objecting to it as savouring of the innovating spirit of the times, and likely to be injurious to the naval service, that it was lost upon the second reading. The bill would probably have been no more heard of, but for the spirit and perseverance of a gentleman by whom it had been brought in, Mr. Sergeant Onslow, who, immediately upon its rejection by the Lords, moved the Commons for a select committee to investigate the subject. His motion was instantly complied with; and the committee thereupon appointed, reported the existing laws to be inadequate to the public security. His ground being thus strengthened, the learned sergeant, in the following

sion, introduced the bill again, when, as before, it passed speedily through the Commons; but, though there appeared to be no direct opposition to it in the other House, and the chief justice of the King's Bench had become friendly to it, yet it was found necessary, in order to facilitate its progress, and to secure its passage before the close of the session, which was far advanced, to withdraw the great seal from its provisions, and to confine the powers granted by it to the judges of the courts of common law. Thus altered, it passed into a law without further objection.

"The bill in its original shape, as introduced by the learned sergeant, was nearly, if not entirely, the same with that prepared by the judges in 1758. The act differs from it in the substitution of a power to arrest and hold to bail by the warrant of a judge, instead of the granting of an attachment by a judge in case of disobedience; in the omission of powers to grant issues and award costs; in making no mention of the great seal; and in its extension to Ireland."*

This statute recites that the writ of Habeas Corpus has been found by experience to be an expeditious and effectual method of restoring any person to his liberty who has been unjustly deprived thereof,—and that extending the remedy of such writ, and enforcing obedience thereunto, and preventing delays in the execution thereof, will be advantageous to the public,—and that the provisions made by the act of Charles II. only extend to cases of commitment or detainer for criminal or supposed criminal matter: and proceeds to enact that persons confined (otherwise than for some criminal or supposed criminal matter, and except persons imprisoned for debt, or by process in any civil suit) may complain to any of the judges in vacation, and they are required on such complaint by affidavit or affirmation showing probable and reasonable ground, to award a writ of Habeas Corpus ad subjiciendum, and non-obedience to such writs is declared to be a contempt of court, and punishable accordingly. The judges are also, by sec. 3, expressly empowered "in all cases provided for by the act, although the return shall be good and sufficient in law, to proceed to examine into the truth of the facts set forth in such return, and to do therein as to justice shall appertain," and if any judge has a doubt as to the truth of the return, he may bail the person confined, on a recognizance to appear in the term, and abide the order of the court.

* Bac. Ab. v. 4, ubi suprà.

By sec. 6, process of contempt may be awarded in vacation against persons disobeying the writs of Habeas Corpus in cases within the statute of Charles II.

Such are the provisions of the last act on this important subject, and with them I close the present exposition, and proceed to the Report of the arguments and judgments in the case of the Canadian prisoners. Probably the reader will feel, on a careful consideration of the doctrine urged on the part of the Crown, adopted almost to their full extent by the Judges of the Court of Queen's Bench, and not expressly negatived by the Barons of the Exchequer, that the law of Habeas Corpus is not in a satisfactory state; and that if, on further consideration, the views of the Court of Queen's Bench should be confirmed, this great writ is much less efficacious for the protection of personal liberty, than the people of England have hitherto fondly believed.

A. F.

REPORT

OF

THE CASE OF THE CANADIAN PRISONERS.

THE QUEEN *v.* BATCHELDOR.

1839.

Statement of the case.

On the 17th December, 1838, twelve prisoners were brought (with others) to Liverpool, charged in execution of a sentence of transportation to Van Diemen's Land, for having been concerned in the recent Canadian revolt. On the 28th of the same month, application was made to Mr. Justice Littledale for writs of Habeas Corpus, to bring them before the Court of Queen's Bench, with the cause of their detention, on the affidavits of Joseph Hume, Esq., M.P., and J. A. Roebuck, Esq., stating that the prisoners named had been brought to Liverpool from parts beyond the seas, and that they were illegally detained under semblance of being State prisoners, not having been tried as the law requires, and without having had any sentence passed upon them.

These writs were at once granted by his Lordship, returnable immediate, and were forthwith served upon Mr. Batcheldor, the governor of the borough jail of Liverpool.

Although the writs were returnable *immediate* at chambers, it being vacation, yet it was arranged that the prisoners should not be brought up before Hilary Term: and accordingly, on the 13th January, 1839, the Attorney-General called the attention of the Court of Queen's Bench to the case. Lord Denman observed, that it was reasonable that a case of so much importance should be heard by more than a single judge, and that it should receive the most solemn discussion. If the writ had been returnable in vacation, the judges of the Court had determined to attend at chambers for that purpose.

1839.

QUEEN v. BATCHELDOR.

It was ultimately arranged that in the course of the d... the counsel for the prisoners should be furnished with a co... of the return intended to be filed, and that the case should ... argued on the following Monday. On that day, therefore, obedience to the writs of Habeas Corpus, John G. Parker, Fini... Malcolm, John Grant, Robert Walker, Paul Bedford, Ran... Wixon, Leonard Watson, William Reynolds, Linus Willi... Miller, James Brown, John Anderson, and William Alv... were brought before the Court of Queen's Bench.

The ATTORNEY-GENERAL, the SOLICITOR-GENERAL, S... FREDERIC POLLOCK, and Mr. WIGHTMAN, appeared for t... crown.

Mr. HILL, Mr. FALCONER, Mr. ROEBUCK, and Mr. FR... were counsel for the prisoners.

Two returns, each representing a different class of cases ... the prisoners, were then read.

The Returns.

The first referred to John Grant, L. W. Miller, and W... Reynolds; and it stated that at the sessions of oyer and te... miner and general jail delivery, held at Niagara in Upp... Canada, on the 18th June, 1838, at which Jonas Jones, one ... the justices of her Majesty's Court of Queen's Bench, an... associates, presided; John Grant had been tried and convict... of high treason, and judgment of death recorded: and on th... 22nd of October, 1838, by letters patent under the great se... of the province of Upper Canada, he was pardoned from t... conviction, on condition that he should be transported to V... Diemen's Land for the term of his natural life; but there bei... no means of transporting him from Upper Canada thereto, h... had been sent to Quebec under a warrant of Sir John Colbor... the governor, and sent on board the Captain Ross to Liverpo... at which place he arrived on the 17th December, and th... not being immediate means of transporting him, he had b... committed to the custody of the keeper of the borough j... of Liverpool, to the end that he might be transported to V... Diemen's Land according to the condition of the pardon.

The returns in the cases of Miller and Reynolds were simil... except that they were stated to have been convicted of felony

The second return, which was read, referred to the nine othe...

1839.

QUEEN v. BATCHELDOR.

Provincial Act, 1 Vic. c. 10.

prisoners, and was as follows*:—I, William Batcheldor, keeper of her Majesty's jail, of and for the borough of Liverpool, in the writ to this schedule annexed, named, do certify and return, in obedience to the said writ, that by a certain statute of her Majesty's province of Upper Canada, in North America, intituled, "An act to enable the government of this province to extend a conditional pardon in certain cases to persons who have been concerned in the late insurrection," made and passed in the first year of the reign of her present Majesty, by the queen's most excellent Majesty, by and with the advice and consent of the legislative council, and assembly of the said province, under and by virtue of a certain Act of Parliament, made and passed in the thirty-first year of the reign of his late Majesty King George the Third, intituled, "An act to repeal certain parts of an act passed in the fourteenth year of his Majesty's reign, intituled, 'An act for making more effectual provision for the government of the province of Quebec in North America, and to make further provision for the government of the said province;'" and which first-mentioned statute was duly passed by the legislative council and assembly of the said province of Upper Canada, and assented to in her Majesty's name, by the person who had been appointed, and was at the time of passing the said first-mentioned statute, as aforesaid, by her Majesty, to be the governor of the said province of Upper Canada, reciting, that there was reason to believe that among the persons concerned in the late treasonable insurrection in that province, there were some to whom the lenity of the government might not improperly be extended, on account of the artifices used by desperate and unprincipled persons to seduce them from their allegiance; it was, amongst other things, enacted, that upon the petition of any person charged with high treason, committed in the said province, preferred to the lieutenant-governor before

* So many objections of substance and form were taken to this return, that I have thought it desirable the document should be set out to render the arguments intelligible. It was amended in the course of the argument by leave of the Court, on the prayer of the Attorney-General, and is set out as finally amended.

1839.

QUEEN v. BATCHELDOR.

the arraignment of such prisoner, and praying to be pardoned for his offence, it should and might be lawful for the lieutenant-governor of the said province, by and with the advice and consent of the executive council thereof, to grant, if it should seem fit, a pardon to such person, in her Majesty's name, upon such terms and conditions as might appear proper, which pardon being granted under the great seal of her Majesty's said province, and reciting, in substance, the prayer of such petition, should have the same effect as an attainder of the person therein named for the crime of high treason, as far as regarded the forfeiture of his estate and property real and personal; and that in case any person should be pardoned under that act, upon condition of being transported or banishing himself from that province, either for life or for any term of years, such person, if he should afterwards voluntarily return to that province, without lawful excuse, contrary to the condition of his pardon, should be deemed guilty of felony, and should suffer death as in case of felony. And I do further certify, that by another statute of her said Majesty's provincial Act, of Upper Canada, intituled, "An act to provide more effectually for the punishment of certain offences, and to enable the governor, lieutenant-governor, or person administering the government of this province, to commute the sentence of death in certain cases, for other punishment in this act mentioned, made and passed in the seventh year of the reign of his late Majesty King William the Fourth, in the manner and by the persons and authority required for the purpose by the said Act of Parliament, made and passed in the thirty-first year of the reign of his late Majesty King George the Third—after reciting that it was expedient to make further provision for the effectual punishment of certain offences thereinafter mentioned, it was enacted that in case of the conviction of any person after the passing of this act, of various felonies and offences (particularized in the return) the person convicted of such offence might be sentenced to such punishment as was then provided by law for any such offence, or if the court, which was to pass sentence

Provincial Act, 7 W. 4.

1839.

QUEEN v. BATCHELDOR.

such convict, should think fit, might be sentenced to be imprisoned only, or imprisoned and kept to hard labour, or in solitary confinement, in the common gaol, or in any penitentiary or house of correction that had been or might be provided in that province for such purpose, for any term not exceeding seven years. The act then contained various provisoes, which were particularly set out in the return; and it continued—and that it should and might be lawful for the governor, lieutenant-governor, or person administering the government of that province, to commute the sentence of death, which might be passed upon any person convicted of a capital crime, other than high treason or murder, for transportation for life, or term of years, to such place in his Majesty's dominions, as might be assigned for the reception of convicts, or for banishment from that province for life, or any term of years, or for solitary confinement, or confinement with or without hard labour in any penitentiary or house of correction that might be appointed for such purposes, either during life, or for any term of years. And I do further certify, that by another statute of her Majesty's said province of Upper Canada, intituled, "An act respecting the transportation of convicts made and passed in the seventh year of the reign of his late Majesty King William the Fourth, in the manner and by the persons and authority required for that purpose by the said Act of Parliament made and passed in the thirty-first year of the reign of his late Majesty King George the Third. After reciting that it was expedient to facilitate the transportation of offenders to such place or places in his Majesty's dominions as might be assigned for the reception of convicts, and to make further provision in respect to the punishment of transportation, it was enacted, that notwithstanding anything contained in a certain act of the parliament of that province, passed in the fortieth year of the reign of his late Majesty King George the Third, intituled—"An Act for the further introduction of the Criminal Law of England in this province, and for the more effectual punishment of certain offenders," it should be lawful, after the passing of that act, to sentence offenders to transportation, not only in such cases where by any

1839.

QUILN
v.
BATCHELDOR.

law then in force, or thereafter to be passed, it was expressly provided that such offenders might be transported, but also in every case in which, by the provisions of the said act, passed in the fortieth year of his late Majesty King George the Third, the person convicted would be liable to be banished from that province: Provided always, nevertheless, that no offender should, under the authority of that act, be sentenced to be transported except by such court, and in such cases, for such term of time, as the same offender might, according to the said act, be banished from that province; and that nothing in that act contained should extend, or be construed to take away, or affect the power of sentencing offenders to be banished according to the act thereinbefore recited, when it should appear proper to pass such sentence. And that all and singular the provisions then in force, which were contained in the said Act of the Parliament of that province, passed in the fortieth year of the reign of his late Majesty King George the Third, respecting persons returning to that province before the expiration of the period for which they had been banished by sentence of a court, or had consented to be banished according to the terms of any conditional pardon granted to a convict sentenced to suffer death, should equally extend and be in force, with respect to any person returning from transportation after that act, whether such person should have been sentenced to be transported, or having been capitally convicted, should have been pardoned, on condition of being transported for a time to be mentioned in such sentence, or for life, where that might be lawful, and should in the opinion of the court passing such sentence appear proper, to such place as the governor, lieutenant-governor, or person administering the government of that province, by and with the advice of the executive council thereof, should appoint. And that it should and might be lawful for the governor, lieutenant-governor, or person administering the government of the province, by and with the advice of the executive council thereof, to determine, upon reference to his Majesty's government in England, to what foreign possession of his Majesty

1839.

QUEEN v. BATCHELDOR.

convicts should be transported from that province, under the provisions of that act: and that an instrument under the sign manual of the governor, lieutenant-governor, or person administering the government of that province, and directed to the judges of the Court of King's Bench, declaring to what colony or place it had been determined to transport any convict, should be sufficient authority for the judge who passed sentence on such convict, or, in his absence, for any other judge of the said court, to make his warrant, authorising any person or persons to carry and secure such convict, in and through that province, towards the sea-port or place from whence he or she was to be transported; and if any person or persons should rescue such convicts, or any of them, or assist them, or any of them, in making their escape from such person or persons as should have them in their custody as aforesaid, such offence should be punishable in the same manner as if such convict had, at the time it was committed, been confined in a gaol or prison, in the custody of the sheriff or gaoler, after sentence for the crime of which he should have been convicted. And that if, by reason of any difficulty occurring which might prevent the transportation or reception of any convict in any colony or possession of his Majesty, the sentence which should have been passed on any such convict could not be carried into effect, such convict might be detained in prison for a period not longer than that for which he should have been sentenced to be transported, unless it should appear expedient to pardon such convict, in which case it might be made a condition of such pardon that the convict should banish himself from that province for a period not exceeding the residue of the time for which he was to have been transported. And I do further certify that after passing the said first mentioned statute, to wit, at a special session of oyer and terminer and gaol delivery began and holden at Toronto, in the home district of the said province, on Thursday the eighth day of March, in the first year of the reign of her said Majesty, before the Honourable John Beverley Robinson, chief justice of the said province, and others his fellows, justices and commissioners

1839.

QUEEN v. BATCHELDOR.

of our said lady the Queen under and by virtue of her
Majesty's Commission under the great seal of the said prov
issued in pursuance of another statute of her Majesty's
province, duly passed in the same manner and by the
authority as the said first mentioned statute on the twelft
of January, in the first year of her Majesty's reign, and ent
"An act to provide for the more effectual and impartial
of persons charged with treason and treasonable prac
committed in this province," the said Leonard Watson
indicted for the crime of high treason, and before the arr
ment of the said Leonard Watson, he the said Leonard
Petition. son humbly petitioned the Lieutenant-Governor of the
province in accordance with the said statute first herein
tioned, confessing his guilt of the treason charged agains
as aforesaid, and professing his penitence, and praying fo
merciful consideration of his case, and that her Maje
gracious pardon might be extended to him upon such cond
as the said Lieutenant-Governor of the said province, b
with the advice of the said executive council, should see fit
the said Lieutenant-Governor, by and with the advice o
Pardon. said executive council, did, in her said Majesty's behalf, co
that mercy should be extended to him the said Leonard
son upon the conditions following, that is to say, that th
Leonard Watson be transported and remain transported
Majesty's penal colony of Van Diemen's Land for and d
the term of his natural life, to which terms and condition
said Leonard Watson did assent, and the said Lieute
Governor did thereupon, in her Majesty's name, on the tw
second of October, in the year of our Lord one thousand
hundred and thirty-eight aforesaid, by letters patent under
great seal of the said province of Upper Canada, dated th
and year last aforesaid, pardon, remit, and release the
Leonard Watson of and from all and every punishment wha
ever which might be inflicted upon him the said Leonard Wa
by reason of the treason so as aforesaid confessed by him,
condition nevertheless that he the said Leonard Watson sh
be transported and remain transported to the said penal c

of Van Diemen's Land for and during the term of his natural life. And I do further certify and return that there being no means of transporting the said Leonard Watson directly from Upper Canada aforesaid to Van Diemen's Land aforesaid, it became and was necessary to take him to Quebec in her Majesty's province of Lower Canada in North America, for the purpose of carrying the said condition in the said pardon into effect, the said place called Quebec being the readiest and most convenient place for that purpose, whereupon and in order to carry the said condition into effect, the said Leonard Watson was, after the said pardon, conveyed by the authority and warrant of the said Lieutenant-Governor of Upper Canada from the said province of Upper Canada unto the said province of Lower Canada, and was there, upon his arrival in Lower Canada aforesaid, by virtue of a warrant in that behalf of Sir John Colborne, governor of the said province of Lower Canada, delivered into the custody of the sheriff of the district of Quebec in Lower Canada aforesaid, for safe keeping until he could be transported according to the said condition, the same being the proper and most convenient custody in that behalf. And I do further certify and return that there not being any means of conveying the said Leonard Watson directly from Lower Canada aforesaid to Van Diemen's Land aforesaid according to the said condition, it became and was necessary, in order to carry the said condition into effect, to convey the said Leonard Watson to England, to be taken from thence to Van Diemen's Land, in fulfilment of the said condition, and thereupon afterwards, to wit, on the seventeenth day of November, one thousand eight hundred and thirty-eight, the said Leonard Watson was delivered by the said Sheriff of Quebec into the custody of Digby B. Morton, captain of the bark "Captain Ross," for the purpose of being conveyed to England aforesaid, to the end that the said Leonard Watson might be thence again transported to Van Diemen's Land as aforesaid. And the said Digby B. Morton having arrived with the said ship at Liverpool as aforesaid, to wit, on the seventeenth day of December last, with the said Leonard

1839.

QUEEN v. BATCHELDOR.

Watson on board thereof, and there not being the means im... diately ready for conveying him from Liverpool aforesaid to Van Diemen's Land as aforesaid, it became and was necessary that the said Leonard Watson should be placed in some safe cu... until the means could be provided for conveying him to Van ...men's Land as aforesaid, and the said jail of and for the ... Borough of Liverpool being the fittest and most convenient ... for that purpose, he the said Digby B. Morton did, on the ... and year last aforesaid, deliver the said Leonard Watson int... custody at Liverpool aforesaid, and I have kept him in my cu... whilst means have been and are preparing with all possibl... patch for the causing the said Leonard Watson to be transp... to Van Diemen's Land as aforesaid. And these are the c... of my detaining the said Leonard Watson in my custody ... whose body I have ready, as by the said writ I am comma...

After the returns had been read, the ATTORNEY-GEN... (supported by the SOLICITOR-GENERAL, POLLOCK (Sir F... WIGHTMAN,) took a preliminary objection,—viz. that a ... judge had no authority to issue a writ of Habeas Corp... vacation, in such a case, and especially if returnable imme... It was not by any means a matter of course that the writ ... be granted; as in the case of Sir John Hobhouse*, ... Tenterden had distinctly laid it down that the reasons ... be stated to the Court, for that, though a writ of rig... was not a writ of course. It was necessary to show a pre... cause for the application, verified by affidavit. At co... law, a writ of Habeas Corpus could not be granted ... Court of Queen's Bench in term-time, unless upon m... like writs of mandamus, &c. The Lord Chancellor indeed ... grant such writs in vacation, for his Court was always o...

Objection, writ not grantable in vacation.

COLERIDGE, J., here referred to 3 Blackstone's Comm... *contrà*—"This is a high prerogative writ, and theref... by the common law, issuing out of the Court of Ki... Bench, not only in term time, but also during the ... tion, by a fiat from the Chief Justice, or any other ... judges, and running into all parts of the King's domini...

* 3 B. and A. 420.

or the King is at all times entitled to have an account why the liberty of any of his subjects is restrained, wherever that restraint may be inflicted. If it issues in vacation, it is usually returnable before the judge himself who awarded it, and he proceeds by himself thereon, unless the term should intervene, and then it may be returned in Court." [His Lordship also referred to Crowley's case *, where Lord Eldon had much considered the matter, and seemed to shrink from giving countenance to applications in Chancery for such writs.] The Habeas Corpus Act, 31 Car. 2, c. 2, only applied to cases where persons were detained without having been brought to trial, and not where, as here, they were in *execution* of a sentence. The statute 56 Geo. 3, c. 100, commonly called Sergeant Onslow's Act, was intended to apply to cases where parties are deprived of their liberty, by father or mother, and cases of that description.

[COLERIDGE, J., referred to *Exparte* Beeching †, where that act had been held to apply to cases of smuggling.]

HILL said that the writ now before the Court had issued at common law, and therefore any of the judges might issue it.

The ATTORNEY-GENERAL contended that it could not be so granted, where parties are in execution of a sentence. The writ, if so issued, might not be improper in the first instance, but as soon as the Court saw, by the return, that the prisoners were detained in execution, they would quash the writ *quia improvidè emanavit*. This was done in Brass Crossby's case ‡. It was then contended, that in Crowley's case Lord Eldon's impression was, that the writ was always issuable from the Court of Chancery, as that was *officina justitiæ*, but that it could only issue from the common law Courts in term time. This doctrine was indeed expressly laid down in Bacon's Abridgment, tit. Habeas Corpus, B. 1 (vol. iv. p. 117). "But it seems that by the common law, the Court of King's

* 2 Swanston 1. † 4 B and C. 136.

‡ 2 W. Blackstone, 754; 3 Wilson, 188. None of the reports of this case bear out the statement. All that appears is, that the prisoners were remanded. The natural inference from which is, that the returns were held good, and not that the writs were quashed.

1839.

QUEEN v. BATCHELDOR.

Bench could have awarded it only in term-time; but that the Chancery might have done it, as well out of as in term, because *that* Court is always open."

[Lord DENMAN referred to three cases in Burrow, which supported Blackstone's dictum, where writs of this description had been issued in vacation, and returnable immediate viz. *R.* v. *Dr. Shebbear* *, *R.* v. *Clarke* †, and *R.* v. *Mead* ‡].

HILL was allowed time till the next day to answer this preliminary objection; referring, however, at the moment to the opinion of the majority of the judges in 1758, delivered in the House of Lords, in favour of the power of the common law Courts, and to the cases cited by C. J. Wilmot, in his "Judgments and Opinions."

On his appearing the next day to argue the point, LORD DENMAN, C.J., delivered the unanimous judgment of the Court that they had the power at once to issue this writ sitting in vacation. "There cannot be a doubt," said his Lordship, "that we are bound by a course of practice, which has now been in existence above 80 years, viz. since 1758, of granting writs of Habeas Corpus by one judge, returnable immediate, and returnable before the four judges. In the year 1758, a bill was introduced into the House of Lords, for the purpose of remedying some of the defects then complained of, as existing in the law and practice of the writs of Habeas Corpus. The House of Lords at that time desired the opinion of the judges§, and seven out of ten declared that the practice now objected to was legal, Mr. J. Wilmot stating that his mind was satisfied that eighty years before that time the same practice had been in existence, so that we have at least a period of double that time to warrant the course now pursued. I am quite aware that we might be entertained by antiquarian researches, by the production of a quantity of writs not issued in vacation; but it seems to me that we should be tampering with that great remedy of the subject, the writ of Habeas Corpus, if we

Judgment, on preliminary objection.

* 1 Burr. 460. † Ib. 606. ‡ Ib. 502.

§ See Parliamentary History, vol. xv. p. 898, et seq., and Wilmot's Judgments and Opinions, p. 77.

…t say that there are abundant precedents to justify the practice, as one well established in this Court. According to Mr. Dodd's interesting account of this matter, in his edition of 'Bacon's Abridgment' *, it appears that when the judges were consulted in the House of Lords, there were included among the seven, C. J. Willes, and Mr. J. (afterwards L. C. J.) Wilmot; and Mr. J. Foster, though he did not attend the hearing on account of the death of his wife, was known to entertain the same opinion, and indeed he wished to carry the remedy still further †. And Lord Mansfield, who was a member of the House of Lords at the time, and therefore did not pronounce any opinion among the judges, has left us the means of well knowing what his opinion was, by the practice he afterwards followed in these cases. The fact too that the bill then introduced was dropped, furnishes a proof that the statement of the judges' opinions was considered by the House of Lords to be a sound exposition of what the law then was. We can therefore have no difficulty in overruling the objection."

HILL observed, that the real majority of the judges was ten to three, inasmuch as Lord Chancellor Hardwicke (as appears by the debate) was evidently of the same opinion ‡.

The ATTORNEY-GENERAL expressed his satisfaction at the decision, which had now set to rest the conflicting authorities, and established the right of the Court §.

---

* Vol. 4, p. 140, Habeas Corpus, B. † Dodson's Life of Foster, p. 68.

‡ The majority of the Judges present were seven; Mr. J. Foster, though absent, was known to be of the same opinion; Lord Mansfield, by his conduct (see the cases in Burrow, suprà) showed his opinion to be similar; and Lord Hardwicke objected to the bill of 1758, on the ground that it was unnecessary, as the common law gave all the powers proposed to be conferred by it, (see Parliamentary History, vol. xv. p. 898.) He said, "That he had indeed long been sensible of one defect in the law with respect to the Habeas Corpus, and wished it to be supplied, but that there was not the least provision for it in the present bill, and that was a power in a single judge, during the vacation, to *enforce a speedy return* to a writ of Habeas Corpus granted by him." His lordship intended by this to point out, that though the Judge had the power to issue the writ, he was deficient in the power of enforcing immediate obedience to it, as the party might stand out on an alias and pluries.

§ See the Judgment, *post*.

1839.

QUEEN v. BATCHELDOR.

HILL, FALCONER, ROEBUCK, and FRY, then moved th... return be quashed for insufficiency*. Although they migh... if necessary would hereafter, contend that the return mi... controverted in regard to its allegations, and that its state... might be made the subject of pleading or dispute by affi... yet, as the return seemed to them so bad on the face of it... would at once apply to the court for the discharge of Wats... his eight associates, on the ground that even if all the state... in the return were admitted to be true in fact, yet that its... operation was inadequate to justify the gaoler in holding... in custody. The return was substantially grounded o... Provincial Act of Upper Canada, 1 Vict. c. 10, which en... that to those who, before their arraignment of treason, s... confess their guilt, and pray a pardon for their offen... should be lawful for the governor, if it should seem to h... to grant a pardon "on such terms and conditions as... appear proper." The return then stated that the prison... confessed his guilt, and received pardon on condition of... transported for life. The first objection to this retur... that no conviction of the prisoner was stated to have... place, and without a conviction there could be no autho... any person in this country to hold the prisoners in c... For the only statute upon which any pretence of th... could be set up, was the Transportation Act, 5 Geo. IV.... No Provincial statute could confer any such authority... gaoler here: his only justification must be based on a... of the Imperial legislature. But the 5 Geo. IV., c. 8... expressly confined to cases of "convicts," and to them... The 17th sec. of that act recited, that, "whereas, by t... in force, in some parts of his Majesty's dominions, not... the United Kingdom, offenders *convicted* of certain offe... liable to be punished by transportation beyond the se... *other convicts, adjudged* to suffer death in such parts of h...

First objection to return; no conviction of the prisoners.

* To avoid tedious repetition, I have thrown the two argumen... Courts of Queen's Bench and Exchequer together. The same p... maintained in both, but more illustrations and authorities were a... the latter than the former, on behalf of the prisoners. The argu... the main were precisely the same in both Courts.

jesty's dominions, have received or may receive his Majesty's most gracious pardon, upon condition of transportation beyond the seas, and there may be no means of transporting such convicts to any of the places appointed by his Majesty in council in that behalf, without first bringing them to England;" and the act accordingly proceeded to make provision for such cases. That statute clearly applied only to "convicted" persons. But where was the conviction here? It was perhaps to be said that, although there was no conviction, yet there was something *equivalent* to it. But the court would not tolerate such a doctrine of equivalents in penal law, where the strictest principles of interpretation must prevail. Besides, the statute fixed its own meaning on the word "convict," by requiring an adjudication by some court or judge. Nothing approaching to such an adjudication, was here to be found. The pardon could not be considered an attainder, for the provincial act expressly enacted that it should only have that effect as regarded the forfeiture of property. All the proceedings, as stated in the return, were so repugnant to the wise jealousy and well-known principles of English law, that every presumption arose against them; and they were as distant as possible from that calm, decent, solemn transaction in open court before judge and jury, which alike by common law and the 5th Geo. IV., amounted to adjudication and conviction. It appeared by the return, that the prisoner was in gaol, that he presented something which the gaoler of Liverpool chose to call a petition, containing something else which the same ready affirmant undertook to inform the court was a confession—and that upon these matters, before arraignment, pardon was granted—everything having been done in private, with no person of public authority watching, and directing, or advising the prisoner. Such a course of proceeding was entirely repugnant to the English law. In even comparatively unimportant civil contracts, the law looked with great suspicion on everything done while the party was in prison. A few years only had elapsed since their lordships had acted on this wise caution, in their rule relating to the ex-

1839.
QUEEN
v.
BATCHELDOR.

ecution of warrants of attorney by prisoners,* which expr... provided that "no warrant of attorney to confess judgm... given by any person in *custody* of a sheriff or other o... upon mesne process, shall be of any force, unless the... present some attorney on behalf of such person in cus... expressly named by him, and attending at his request;" ... who is to attest the execution. If then the court w... jealous of any undue influence over, or ignorant conduct ... person in prison, merely dealing with a part of his prop..., how much more jealous ought they to be when the pri... was trembling with the apprehensions which might op... the innocent in such a situation, and when all the dan... alike of an ignorant or rash conduct of his own interests, ... undue influence upon him, were multiplied ten-fold! ... court, therefore, was bound to deal with the Provincial st... as an act repugnant to the well-known and wise provisio... the English law, and as, therefore, inoperative, or at lea... be construed with the greatest possible strictness.

Second objection to return; no judgment of transportation.

But, secondly, the return did not state that there had ... any *judgment* of transportation, but merely that the gov... had thought fit to commute the punishment, on the petitio... the prisoner, to that effect. Such a power, however, now... existed in the English law. Even the sovereign was una... to execute it, *in invitum*, much less a viceroy. Governors ... entrusted with only limited commissions, which in pra... expressly excepted the power to pardon for treason or mu... The court could not take notice of the extent of this ... vernor's powers; for his commission was not before th... But whether he had the power to pardon for treason ... murder or not, at any rate he could not exercise a fun... which was even beyond his sovereign—viz. commute ... punishment of death for another form of penalty. "The b... of a freeman," says Lord Hobart†, "cannot be made subj... to distress or imprisonment by *contract*, but only by *judgm*... This principle was familiar not only to the English law, bu... law of every civilised state. It was only by judgment of ...

* R. H. 2 Will. IV., s. 72.

† Hobart, 61.

1839.

QUEEN v. BATCHELDOR

that any man could be condemned; and by that same law which created his condemnation, his punishment must be regulated. The crown was the minister of the law, and could only execute its well-known provisions. Accordingly, when the principle of commutation became established as a useful one, and its exercise probably had become frequent, although not legally enforceable *in invitum*, the legislature was resorted to, to sanction its infliction compulsorily whenever thought desirable. At common law the crown was unable to commute so as to enforce the altered punishment, if the criminal thought fit to dissent, and insist upon the original penalty awarded to his offence by the law. No doubt the idiosyncrasy must be very peculiar, which induced a prisoner to compel the judge or crown to hang him, to whom they designed mercy, in substituting what they might think a milder, but be a severer, punishment: but if the prisoner objected to the proposed alteration of his punishment, it could not be inflicted. The fact, that in almost every case which happened, no such objection was made, was no proof of the law. Why should prisoners object to a mitigation of their punishment?* But the great principles of law which secured the liberty of every freeman, were not destroyed, from the want of power or disposition to claim their protection. As that great constitutional judge, Lord Camden, had justly said, when resisting the argument adduced in favour of general warrants, from the long practice that had unquestionably prevailed in issuing them—"There has been a submission of guilt and poverty to power and the terror of punishment."† The return here alleged that the prisoner *consented* to the commutation. But that assent could not alter the case, because, according to Lord Hobart, before cited, it was

* But instances to that effect have occurred. In the 1st vol., p. 137, of Chitty's edition of Sir Wm. Blackstone's Commentaries, there is this note:—"To persons capitally convicted, the crown frequently offers a pardon, upon condition of their being transported for life. Many have at first *rejected* this gracious offer; and there have been one or two instances of persons so desperate as to persist in the refusal, and who in consequence suffered the execution of their sentence."

† Entick *v.* Carrington, 19 State Trials, p. 1068.

1839.
QUEEN
v.
BATCHELDOR.

not by *contract*, but by *judgment*, that a prisoner must be punished. The only authority by which the crown could commute was by the common law. It could not possibly therefore substitute a punishment unknown to that law. That transportation was so unknown. "Exile or transportation," says Hawkins,* "is a species of punishment unknown to the common law of England, and where it is now inflicted, it is either by the choice of the criminal himself, in order to escape capital punishment,† or it is imposed by the express direction of some modern act of parliament; for no power on earth, *except the authority of parliament*, can send a subject of England, *not even a criminal*, out of the land *against his will*. The first introduction of it into our law was in the reign of Queen Elizabeth. But it seems to have taken place more nearly as now practised, about the time of the Restoration."

The practice began shortly after the plantation of our American Colonies, and was probably suggested by the want of labour in them. In Kelynge's‡ Reports, (1665, temp. Car. II.) there is the following report:—"At the same sessions one Edward Parrett was in the place where the prisoners were to stand at the gaol delivery, who was in for murther, for which he had afterwards judgment, and when he was there, one John Copeland, a Scotchman, being in very good clothes, went in thither under colour to see him, and watching the time when the keepers were busy, he opened the little door, which was bolted, and went out, and Parrett, the prisoner, followed him, and they both went together out of the yard, and run down by-allies into White-Fryers." Copeland was found guilty of rescuing Parrett, "and on his request, he being to have clergy, he was allowed to be put into the king's pardon, among those prisoners of that nature who were to be sent beyond the sea, *it having been lately used*, that for felonies within clergy *if the prisoner desire it*, not to give his book, but to procure a conditional pardon from the king, and send them beyond

* Pleas of the Crown, vol. iv. p. 297, cap. 33. A passage to the same effect is in 1 Black. Comm. p. 137. And see also Co. Litt. 133 *a*.

† Of course he means where the prisoner does not dissent. ‡ Page

to serve five years in some of the king's plantations, and then to have land assigned them there, according to the use in those plantations, with a condition in the pardon to be void if they do not go, or if they return into England without the king's license." And in the same book*, several regulations of the judges, made at the Old Bailey, in 1664, are reported, and amongst others, r. 12, "That such prisoners as are reprieved, with intent to be transported, be not sent away as perpetual slaves, but *upon indentures* betwixt them and particular masters, to serve in our English plantations for seven years, and the three last to have wages." This regulation and report show the origin and extent of the practice, and that the commutation was *voluntarily* acceded to by the prisoner. In Roger North's entertaining biography of his brother, the Lord Keeper Guildford†, there is an amusing account of the manner in which this

* Page 4.

† Octavo ed., vol. ii., p. 24, speaking of Jeffries, he says—"There is one branch of that chief's expedition in the west, which is his visitation of the city of Bristol, that hath some singularities, of a nature so strange, that I think them worth my time to relate. There had been an usage among the aldermen and justices of the city (where all persons more or less trade to the American plantations) to carry over criminals, *who were pardoned with condition of transportation*, and to sell them for money. This was found to be a good trade; but not being content to take such felons as were convict at the assizes or sessions, they found out a shorter way, which yielded a greater plenty of the commodity, and that was this. The mayor and justices usually met at their Tolsey, and there they sat and did justice of business. When small rogues and pilferers were brought there, and upon examination put under terror of being hanged, in order to which mittimuses were making, some of the diligent officers attending *instructed them to pray transportation*, as the only way to save them, and for the most part they did so. Then no more was done, but the next alderman in course took one and another as their turns came, some quarrelling whose the last was, and sent them over and sold them. This trade had been driven for many years, and no notice taken of it. It appears not how this outrageous practice came to the knowledge of the Lord Chief Justice, but when he had got hold of the end, he made thorough stitch-work with them, for he delighted in such fine opportunities to rant. He came to the city, and told some that *he had brought a broom to sweep them.* When his Lordship came upon the bench, and canvassed this matter, he found all the aldermen and justices concerned in this kidnapping trade, and the mayor himself as bad as any. He therefore turns to the mayor, accoutred with his scarlet and furs, and gave him all the ill names that scolding eloquence could supply, and so

1839.

QUEEN v. BATCHELDOR.

practice had been abused in the city of Bristol. It was then evidently recent. At common law, therefore, the crown could not commute *in invitum*, for the punishment of transportation; *à fortiori*, a governor. But then it was said that he had authority by the Provincial statute.

Third objection to return; Provincial Act inoperative beyond Canada.

3dly, That statute, however, could not authorize him to transport. Nothing could be clearer than that a local legislature and local governor could only exercise authority within their own province. Beyond the limits of that locality they were powerless, and must be treated as perfect strangers. Any attempt to exercise the authority of government *extra fines territorii*, was merely void and nugatory. The principle of civil law was clear and founded on reason: "Extra territorium jus dicenti impunè non paretur*." The governor, therefore, without the authority of the Provincial statute, would be clearly exceeding his powers, in pretending to hold any prisoners in confinement in any place beyond the limits of his own province. Besides, here the punishment in one case was transportation for seven years, "after the arrival" of the criminal in Van Diemen's Land. But that was clearly bad, as making the punishment capricious, not regulated by the degree of guilt, but depending on the accident of winds and waves. This was clearly bad. The local legislature of Upper Canada could no more infringe the rule just cited, than the local governor. The 31st G. 3, c. 31, which established the present government of Canada, empowered the local legislatures of the two provinces into which Canada was then for the first time divided, to pass laws for the good government of the provinces, "which shall be binding and valid *within the province* in which the same shall have so passed." But that gave them no authority to transport. Banish indeed they might; they might punish any

with rating and staring, as his way was, never left him till he made him quit the bench and go down to the criminal's post at the bar; and if the mayor hesitated a little, or slackened his pace, he bawled at him, stamping, called for his guards, for he was general by commission. Thus the citizens saw their scarlet chief magistrate at the bar, to their infinite terror and amazement." . . . .

* Dig. lib. ii. Tit. 1, s. 20. And see Burge on Colonial Law, vol. i. c. 1.

1839.

QUEEN v. BATCHELOR.

person who should attempt, contrary to their decree, to pass into Canada, but as soon as any person, criminal or not, had gone beyond the confines of their state, their arm was powerless to hold him; and unless expressly sanctioned by an act of the imperial legislature, all proceedings of detention were illegal. Yet such was the power affected to be exercised by the Governors of Upper Canada and Lower Canada; the last of whom, according to the return, affects to possess the right of holding these prisoners in confinement in the latter place for an offence committed in the former, and affects to pass this power into the captain of the ship which brings them to Liverpool, where they are again, by this transmitted virtue, claimed to be legally confined by the gaoler of that town. A pretty chain of illegalities! Not only, however, was the power exerted in this case utterly beyond the authority of the governors of Upper and Lower Canada, viz., to pass *extra fines*, but they had even gone so far as to invade another jurisdiction. They had affected by this act to come *intra fines* of another government, and that even of the parent state. But surely, as soon as the prisoners became amenable to English law, by landing on the English soil, the authority of the Provincial Governor necessarily ceased; otherwise a [illegible] of judicatures and laws would ensue. Canada was, in relation to this country, a foreign state, at least as regards the punishment of criminals. In that sense, and for that purpose, our Colonies were as completely foreign as any Independent Nation. And it was a well-known rule of law, that no country could take notice of the criminal law of another. "Penal laws of foreign countries are strictly local," said Lord Loughborough, in delivering the judgment of the Court in the case of Holliott *v.* Ogden*, "and affect nothing more than they can reach, and can be seized by virtue of their authority: a fugitive who passes hither comes with all his transitory rights,—he may recover money held for his use, and the like, *and cannot be affected in this country by proceedings against him in that which he has left*, beyond the limits of which, such proceedings

Canada a foreign State.

* 1 H. Blac. 135.

1839.

QUEEN v. BATCHELDOR.

do not extend." And this dictum was expressly adopted by Lord Ellenborough, when delivering the judgment of the Court in Woolff *v.* Oxholm*. The doctrine was quite familiar to foreign jurists, as might be seen in Mr. Justice Story's valuable work "On the Conflict of Laws†." In cases, too, where actions had been brought on judgments of our colonies and the Courts thought the proceedings abroad irregular, they had been treated throughout in the arguments and decisions as *foreign*; as in the case of Buchanan *v.* Rucker ‡, on a judgment of the Island of Tobago, and in Becquet *v.* M'Carthy§ on one of the Mauritius. By the 11 G. IV., and 1 W. IV. c. 39, power was expressly given to the two colonies of Van Diemen's Land and New South Wales, to detain the felons transported respectively to each, and escaping to the other. Such an express enactment clearly showed the state of the law before it. Without that statutory power conferred by the Imperial Legislature, the felons of Van Diemen's Land could not have been detained by the governor of New South Wales, and *vice versâ*. But this point had been already decided, by a recent act of the legislature, viz. the Canada Indemnity Act.‖ For that statute was passed to indemnify all persons acting on the Ordinance of Lord Durham, passed in June 1838, in consequence of its illegality, arising from its affecting to deal with persons in Bermuda, over which colony Lord Durham had no jurisdiction. There were other objections to the Ordinance undoubtedly urged, but although various opinions existed in regard to those other objections, yet upon this, the Members of Parliament were unanimous, that the ordinance was clearly illegal. Lord Durham had affected to exercise a power of transporting *extra fines*, which no governor, not even if invested with such powers as those conferred on him ¶, could lawfully exert. Sir John Colborne had committed a similar excess of authority, and the Courts here were bound to treat all proceedings grounded on

* 6 M. & S. 99.
† c. 16, p. 516.
‡ 1 Camp. 63, 9 East, 192.
§ 2 B. & Adol. 951.
‖ 1 & 2 Vict. c. 110.
¶ 1 & 2 Vict. c. 9.

that excess as illegal and nugatory. The principles alike of the civil and common law, the dictates of reason, and now the express judgment of the legislature, demanded that the return to this writ must be quashed.*

But, 4thly, even admitting for the moment that the

* Before the conclusion of the second argument in the Court of Exchequer, the report on British North America, by Lord Durham, was published by order of the House of Commons; and the counsel for the prisoners were enabled therefore in that Court to state, that Lord Durham expressly admits "and the members of his council knew at the time of issuing the ce, that it was not legally enforcable in Bermuda. In his despatch Glenelg, 28th September, 1838, No. 48, p. 185, of the papers ed by the House of Commons on 11th February, 1839, [Correspondence lative to the affairs of Canada], Lord Durham expressly says:- - "The onstituted authority here was the governor, who, under the sanction gislature of Lower Canada, conveyed them by means at his disposal ermudas. *There the power of the legislature of Lower Canada and overnor-general ceased. It was perfectly well understood here, in the passing of the Ordinance, that there was no power in this legislature to pass any laws which could be binding in the Bermudas.* It was foreseen that the governor of Bermuda might have refused his assistance in this emergency, and have declined to allow the prisoners to be landed, or if landed, might have stantly released them; or if not, that before her Majesty could procure any laws to be passed, subjecting the parties to the necessary restraints to prevent their return, *the parties might apply to the Courts of Bermudas for their writs of Habeas Corpus, and might be enlarged and go Islands to return.*" It also appears, on inspecting the report of the in both Houses of Parliament, that the great law advisers of the crown concurred in thinking the Ordinance clearly illegal on this ground. For the Lord Chancellor said, "It seems to be admitted that the governor and council have erred, not because the council has gone beyond its powers, but beyond its jurisdiction. *Undoubtedly, so far as the government has exceeded the limits of its jurisdiction,* the ordinances are illegal." [Mirror of Parliament, 1838, Aug. 9, vol. viii. octavo ed. p. 6160-1.] And the Attorney-General said, in reference to that part of the Ordinance which referred to sending persons to Bermuda and keeping them there in restraint: "This ordinance was a legislative act, and as a legislative act *it could have no power or operation beyond the province of Lower Canada.* The Earl of Durham was governor of the whole of the British American colonies, but his legislative power was confined to Lower Canada. This being a legislative act, it could have no operation beyond the limits of that province; therefore, without hesitation, I pronounce my humble opinion to be, that that part of the ordinance exceeded the authority of the governor and council." [Mirror of Parl. 1838, Aug. 14, vol. viii., p. 6274, octavo edition. And see also to the same effect, Hansard's Parl. Deb., vol. 44, p. 1080—1267.]

1839.

QUEEN v. BATCHELDOR.

4th objection to return.

Transportation illegally conducted.

transportation was in its inception not unlawful, yet its conduct and carrying on were clearly so. By what authority did the governor of Lower Canada affect to interfere and authorise Captain Morton to bring the prisoners to Liverpool? The gaoler thought fit, indeed, on this return, to aver that it was matter of necessity, that they should be so dealt with. But surely there was no clear and obvious necessity for bringing men sentenced to transportation from Quebec, round by England. The ready statement of the gaoler was again at hand, that it seemed fit to the Queen that they should be brought to Liverpool. But how could the gaoler of Liverpool, by possibility, know any such intention of the Crown? Besides, it was a clear principle of law, that the intention of the Crown could only be signified by some document. Lord Coke said expressly* — "The King, being a body politic, cannot command, but by matter of record, for *rex præcipit*, and *lex præcipit*, are all one, for the King must command by matter of record, according to the law." The law was most jealous of any invasion of personal liberty, and expressly required that it should only be effected, as it might be ascertained, by some written instrument. A warrant was indispensable in all cases to justify restraint, unless from the overruling necessity of the case it could not be ob

This jealousy of the law was extremely wise, and should not be relaxed but maintained in its full vigour. There could not possibly be a greater security of personal liberty, than the necessity of justifying restraint by the production of some warrant, whenever that restraint was inquired into. Sir William Blackstone said expressly†, "To make imprisonment lawful, it must either be by process from the Courts of Judicature, or by warrant from some legal officer, having authority to commit to prison,—which warrant must be in writing, under the hand and seal of the magistrate, and express the causes of the commitment, in order to be examined into, if necessary, upon a Habeas Corpus." Now,

* 2 Inst., 186. † 1st vol., p. 136, Comment.

here the prisoners were not detained by any process of a Court, and therefore there must be a warrant in the person claiming to hold them, to authorise their imprisonment. The warrant referred to in the return had two incurable vices. It was given by a person having no authority whatever, viz., the governor of Lower Canada,—and it had not the slightest reference to Mr. Batcheldor. It was directed to "such person or persons as may be lawfully authorised to receive the same." But there was not the slightest allegation in the return to show that Mr. Batcheldor had been so authorized.

5th objection to return. Did not set out the documents.

And lastly, the return was clearly insufficient, because it did not set out the various documents needful to make the Court see that the restraint of these prisoners was justifiable by law. The gaoler of Liverpool took upon himself to say, that they were detained by the legal operation of certain instruments, to which he generally referred, without giving the least specific statement of their contents. He told the Court that there was a petition confessing guilt, and praying commutation, and that there was a pardon on condition of transportation, and a warrant of the Governor of Lower Canada. But it was for the Court, and not the gaoler, to judge how far such documents were of a legal character, and to what extent they justified the detention. The principle of the writ of Habeas Corpus was this—that the Crown, through its judges, was entitled to know why any one of its subjects was held in custody by any other—and for that purpose it was essential that the instruments on which the imprisonment was claimed to be justified, should be laid before them, that *they* might decide whether the legal effect of that instrument had been perverted or mistaken by the detaining party. The liberty of every English subject was secured by this necessity. To permit the person returning the cause of his imprisonment of a party applying for the writ, to state summarily, what he chose to give as the legal effect of judicial proceedings, was to make him the judge of his own case, and to deprive the subject of the privilege of having his cause determined by the Judges of the land. It was against the principle of the writ of Habeas

1839.

QUEEN v. BATCHELDOR.

Corpus, and was contrary to the whole current of authorities from the earliest times, when that great remedy became frequently resorted to. The whole line of cases was consistent, and distinctly established that when the law required written instruments to justify the detention of any person applying for the writ of Habeas Corpus, it was imperative on the party to whom it was directed, in the return claiming to show the cause of the detention, to set out those instruments *in hæc verba* for the examination of the court.* This principle was clearly laid down by that great constitutional Judge Sir John Vaughan, in Bushell's case.† Bushell was one of the jurymen on the trial of Penn and Mead, two Quakers indicted at the Sessions in London before the Recorder for seditiously preaching to a riotous multitude in Gracechurch Street. The jury acquitted them,—and were then fined for the alleged contempt by the Sessions. Bushell was brought up by Habeas Corpus, and the return stated the order of the Court, which alleged that Bushell and his fellow-jurors had found their verdict "contra plenam et manifestam evidentiam." C. J. Vaughan says—"The writ of Habeas Corpus is now the most usual remedy by which a man is restored again to his liberty, if he have been against law deprived of it. Therefore the writ commands the day and the cause of the caption and detaining of the prisoner to be certified upon the return, which, if not done, the Court cannot possibly judge whether the cause of the commitment and detainer be according to law, or against it. Therefore the cause of the imprisonment *ought by the return to appear specifically and certainly to the judges of the return*, as it did appear to the Court or person authorized to commit, else the return is insufficient ..... The Court hath no knowledge by this return whether the evidence given were full and manifest, or doubtful, lame, and dark, or indeed evidence at all material to the issue, *because it is not returned what evidence in particular, and as it was delivered, was given.* For it is not

* Of these cases, *R.* v. *Clarke* was the only one referred to in the argument in the Queen's Bench; the rest were only noticed in the Exchequer.

† T. Jones, 13. Vaughan, 135. 6 Howell's State Trials, 999.

ssible to judge of that rightly, which is not exposed to a man's judgment. But here the evidence given to the jury is not exposed at all to this Court, but the judgment upon the Court of Sessions upon that evidence is only exposed to us, who tell us it was full and manifest. But our judgment ought to be grounded upon our own inferences and understandings, and not upon theirs." In Thomlinson's case*, the return was held insufficient as being too general, for not specifying the cause or matter on which Thomlinson was examined, he having been committed by the Court of Admiralty for not answering some interrogatories. In Seeles's case† the return was held insufficient, because it justified the detention by virtue of an order of the council of the marches of Wales, and did not set out the order. In an anonymous case‡, a return was held ill, which stated a commitment for a contempt of Court, in using contemptuous words, because it did not state what they were. In Watson *v.* Clarke§ a plaint in trespass on the case had been entered in one of the counters of the sheriffs of London; and before any declaration was delivered, an Habeas Corpus issued to bring the cause into the King's Bench. It was generally returned that he had brought an action on the case, which was held not enough, as Lord Holt said it did not appear what was the cause of action, so that it might appear to be properly brought, and that all the proceedings ought to be returned. The position contended for in the present case that the warrant ought to be returned verbatim, so as the Court might judge of its legal efficacy, was distinctly laid down in Rex *v.* Clarke||. There, upon a Habeas Corpus it was returned that Clarke, for refusing to take up his livery, was committed by the Court of Aldermen, by warrant in writing, to the keeper of Newgate. The return was held ill—the court resolving, that "when a commitment is in Court to a proper officer there present, there is no warrant of commitment, and

* 12 Co., 104. † Cro. Car., 557.
‡ 1 Ventr., 336; and see Rudyard's case, 2 Ventr., 22.
§ Carthew, 69, 75. || Salk. 349. Comyn, 24. 12 Mod., 114.

1839.

QUEEN v. BATCHELDOR.

therefore he cannot return a warrant *in hæc verba*, but ... return the truth of the whole matter under peril of an ac... but if he be committed to one that is not an officer, as in th... case, *there must be a warrant in writing, and when there is ... it must be returned, for otherwise it would be in the power of ... gaoler to alter the case of the prisoner, and make it either bett... or worse than it is upon the warrant,—and if he may take upon ... to return what he will, he makes himself judge, whereas the Court ought to judge, and that upon the warrant itself.*"

Nor was this the doctrine of old cases, but was expr... sanctioned by three very recent decisions, viz. Deybel's ca... Souden's case,† and Nash's case. ‡ They were cases ... the acts for prevention of smuggling. Deybel was arrest... board a smuggling vessel, under 59 Geo. III., c. 121. ... which makes smuggling vessels liable to forfeiture within ... leagues of that part of the coast of Great Britain betwee... North Foreland and Beachy Head in Sussex, and allows ... subject on board to be impressed for the navy. The retur... a Habeas Corpus on his behalf stated, that the ship was w... eight leagues of that part of the coast called Suffolk, to wi... Orfordness, in that county. It was held insufficient, as ... court could not take judicial notice that Orfordness was ... between the Foreland and Beachy Head. *Bayley J.* stat... that "in these cases, the greatest certainty is requisite ... the court must see distinctly that the party who is brough... is justly deprived of his liberty." And *Best J.* saying, "... ought to appear on the face of the return, that the case is brou... accurately within the provisions of the Act of Parliam... now that has not been done here." In Souden's case, the retu... stated that a smuggling vessel was found at the fish-mar... within the limits of the ancient town of Rye. The cou... thought the return bad, and discharged the prisoner, as it was quite consistent with the return that the vessel might be dra... up on land, which would clearly not be a case within the statute. In Nash's case, the return stated that the prisone... as

* 4 B. and C., 245. † Ib., 294. ‡ Ib., 295.

carried before a magistrate, under 57 Geo. III., c. 187, s. 6, and "upon due proof," committed. It was held insufficient, *Abbott C. J.* observing, "This Act of Parliament is one highly beneficial in preventing frauds upon the revenue; but at the same time, inasmuch as it trenches very strongly on the liberty of the subject, we must take care that its provisions are strictly preserved. This averment is one of a conclusion of law: it states that, upon due proof, the party was committed. Now, whether that was so, this return does not enable us to judge; for unless we know what the proof was which was given, it is impossible for us to tell whether it was the proof required by the Act of Parliament." So here the court could not see whether the provisions of the Provincial act, 1 Vict. c. 10, had been legally pursued. It was necessary that they should have the means of judging whether the petition and pardon were in conformity to that statute. In the cases last cited, the court with anxious astuteness criticized the return, although there the danger of any arbitrary dealing by the Executive with the subject, was much less to be apprehended than in cases of treason, where the prisoner required every protection against the arm of power, and where he was, as Lord Erskine had well observed,* "covered all over with the armour of the law." The court, therefore, acting on that wise principle of jealousy, and abiding by the uniform current of authorities, were bound to quash this return as insufficient, in not placing before them the means of seeing that the provisions of the Provincial act had been duly complied with.

1839.

QUEEN v. BATCHELDOR.

The ATTORNEY-GENERAL, SOLICITOR-GENERAL, POLLOCK, SIR F., and WIGHTMAN, supported the return.

1st and 2nd objections. No conviction. No judgment of transportation.

As to the first and second objections. Although certainly there had been no conviction or judgment of transportation, yet proceedings had been had which were tantamount to a conviction. The prisoners had confessed their guilt, and prayed for pardon, which had been granted on condition of their undergoing a sentence of transportation; of which they were now suffering the execution. The mercy of the crown,

* Speech for Hatfield, vol. v., p. 6, of his Speeches.

1839.

QUEEN v. BATCHELDOR.

through the governor of Upper Canada, had been graciously extended to them: and now they thought fit to dissent from that very sentence for which they had prayed. But it was legally enforceable against them, even *in invitos*. The crown could commute at common law, even before conviction, any form of punishment for any lesser penalty, not expressly repugnant to law, as, for instance, mutilation. No doubt it was beyond the power of an innocent person to subject himself to punishment "by contract;" but where high crimes had been confessed, the crown could substitute a lesser punishment than death. Its power extended to any penalty short of life and limb: transportation was of that description. It was a lesser punishment frequently sanctioned by the legislature. Instances had occurred in which such a power as the present had been exercised by the crown. In the reign of William III., the Earl of Clancarty was pardoned for the crime of high treason on condition that he would transport himself for life. In 1704, Sir John Maclean was pardoned on a similar condition. In 1[illegible], Margery Day was pardoned on condition that she should subject herself to be transported beyond the sea for life. Joseph Mulholland was pardoned on the same condition. In the rebellion of 1745, many persons were also pardoned on the same condition, after indictment and before trial. The patents for the pardon remained in the patent-office, and were all founded on the confession of the prisoners, and on the condition that they should suffer themselves to be transported to America. These pardons, too, were expressly recognised by the 20 Geo. II., c. 46, which recited that, "during the late rebellion, and since, a great many persons who had taken up arms, were by his Majesty's great vigilance apprehended, many of whom conscious of their guilt, have by their petition implored his Majesty's mercy, upon condition of their being transported to some of the British colonies in America; and that his Majesty, out of his great clemency, hath been most graciously pleased to grant his royal pardon, as well to those tried and convicted, as those who, by their petitions, have acknowledged their guilt, and implored his Majesty's mercy, as aforesaid."

It proceeded to enforce the pardons so granted, by imposing the penalty of death on all who should return from transportation without license, or go into Spain or France. A similar course was pursued in the Irish rebellion of 1798. The Irish Act, 38 Geo. III., c. 78, recited that, "during the wicked rebellion, several persons found acting therein, have been apprehended, several of whom being conscious of their guilt, have expressed their contrition for the same, and have implored his Majesty's mercy, that he would be graciously pleased to order all further prosecution against them to cease, and to grant his royal pardon to them *on condition of their being transported*, banished, or exiled;" and it proceeded to inflict the penalty of death on all who should violate the condition, and return without license.

The power now contended for, therefore, was one which had frequently been exercised by the crown, and had been expressly sanctioned by the legislature. But if the condition was void, the pardon also was void, and then the prisoners were to submit to the penalty awarded by the law to their offence, viz. death.

As to the objection, that this court could not take notice of foreign judgments, and that penal laws were strictly local, the answer was complete and obvious—that Canada was not a foreign state, but a colony of England— a part of the British empire, and the courts here were bound to support their judicial proceedings. The cases, therefore, of Folliott *v.* Ogden,* and Woolf *v.* Oxholm,† were quite inapplicable. It was unnecessary to discuss the power of the crown at common law to grant such a pardon as the present, because it was not by virtue of any such power that the pardon was sought to be upheld.

For, 3rdly, the return justified the pardons, under the Provincial statute, 1 Vict. c. 10, which it was clearly competent for the Canadian legislature to pass, and which expressly conferred on the governor and council the power contended for, and on which they had acted in granting the pardons in ques-

3rd objection. Provincial Act.

* 1 H. Blac., 135. † 6 M. and S., 99.

1839.

QUEEN v. BATCHELDOR.

tion. That statute was conclusive on the subject. It was passed by the legislature, established by the act, 31 Geo. III., c. 31, which authorized the passing of any acts assented to by the crown. It was an act of the greatest mercy, and not, as had been contended for the prisoners, an act of harshness and oppression. So far from being repugnant to the laws of England, it was quite consistent with them, and was based on mildness and humanity. It recited that there were persons concerned in the late insurrection to whom the lenity of government might not improperly be extended; and then empowered the lieutenant-governor of the province, with the advice and consent of the executive council, to grant a pardon before arraignment, on such terms and conditions as might appear proper. Although, as before admitted, no person could voluntarily subject himself to mutilation, yet surely it was quite competent for the legislature to pass an act by which any person confessing a crime and praying a pardon, might be punished on such confession, even before trial. A provision of this kind was, indeed, one of the clauses of the Habeas Corpus Act, 31 Car. II., c. 2, s. 13, which enacted, "that nothing shall extend to give benefit to any person who shall by *contract* in writing agree with any merchant to be transported;" and the 14th sec. provided that, "if any person convicted of felony shall, in open court, *pray* to be transported, and the court shall think fit to leave him for that purpose, he shall be so transported." The expression, "on such terms and conditions as might appear proper," was perfectly intelligible, and capable of an easy and distinct interpretation, in consonance with the English laws. Of course, it was to be construed to include every species of punishment known to the law. Although transportation might not be known originally to the common law, yet it had now been frequently sanctioned as a mode of punishment by the legislature, and must be recognised by the court as one perfectly well known and agreeable to the law. It had been said, indeed, on behalf of the prisoners, that in one of these cases, the punishment of transportation had been inflicted for a certain number of years after the party's arrival in

1839.

QUEEN v. BATCHELDOR.

Van Diemen's Land, and that such a punishment was illegal. But the answer to that objection was obvious; viz. that as transportation for life could be inflicted, any minor term could of course be imposed, and was no injustice. And with respect to the objection that the attainder only worked a forfeiture of property, it was clear that the 2nd section was inserted to prevent the absurdity which would have followed, in allowing a person pardoned of high treason, but on condition of transportation, still to remain a landholder of Canada. Was it to be said that that attainder was to be the only punishment, and that the condition on which the pardon had been granted was not to be performed, and held as entirely nugatory? Surely the Court would sanction no such doctrine. The pardon was conditional; and unless the condition was observed, it would not operate. The second section of the act was inserted to prevent that pardon, when absolute by the performance of the condition, from saving the forfeiture of estate, which it was clear that no person, who had confessed high treason, ought to be allowed to retain. The governor had exercised the power conferred by the act, on the condition of transportation—a condition perfectly proper and legal. The other statutes set forth in the return showed clearly that transportation was a punishment in use in Canada. But the 17th sec. of the 5 Geo. IV., c. 84, was a conclusive argument that such a form of punishment could be legally employed in the colonies. The recital of that section was a legislative recognition that such a power existed. "Whereas by *the laws in force* in some parts of his Majesty's dominions, *not within the United Kingdom*, offenders convicted of certain offences are liable to be punished by transportation: and there may be no means of transporting such convicts to any of the places appointed by his Majesty, *without first bringing them to England*." The act then provided for the disposal of such convicts in England. But it expressly recognised the power, denied on behalf of the prisoners, of transportation from the colonies, by virtue of Colonial laws. For a review of all the acts passed by the Imperial legislature in reference to transportation, from the 18 Car. II., c. 3, the

1839.

QUEEN v. BATCHELDOR.

first on the subject, to this very act, the general consolidating statute, distinctly showed that there was no power given to *them* to transport from the colonies. *They* only referred to transportation from the British Isles. And, therefore, as the 5 Geo. IV. expressly recited, that there were "laws in force" authorising such transportation from the colonies, which, in the course of transit, rendered the detention of the prisoners here necessary, those laws must, of course, be laws of the local legislatures. The Imperial Parliament had not authorised any such transportation before the 5 Geo. IV., c. 84, by any express statute. But the 5 Geo. IV., c. 84, contained the statement of the legislature, that "laws were in force" to that effect. The conclusion was irresistible, that such laws must be Provincial, and now they had received the express sanction of Parliament. The practice had continued for a long period uninterrupted and unquestioned; and it would be most dangerous for the court to hold that all the sentences of transportation from the colonies, which had passed during so many years were unlawful.

Transportation Act.

The first Transportation Act was 18 Car. II., c. 3; which authorised transportation to be inflicted on the moss-troopers of Northumberland and Cumberland. The next was 22 Car. II., c. 5, s. 4, which authorised the judges to transport persons convicted here of stealing cloth from the rack, or of embezzling his Majesty's ammunition and stores. The 4 Car. II., c. 7, s. 4, contained a similar provision in the case of those who maliciously burned houses, stacks of corn and hay, or killed or maimed cattle. These were the only acts before the Habeas Corpus Act, which, in the 14th section, contained a proviso that the preceding provisions against illegal imprisonment in foreign jails, should not extend to cases of persons praying in open court to be transported. The next statute on this subject was 4 G. I., c. 11, which, for a long period was the chief statute regulating transportation. It authorized the transportation to America of felons convicted here of robbery and larceny; and contained many provisions directing the mode of conducting that punishment. This act was confirmed and

1839.

QUEEN v. BATCHELDOR.

...ered more effectual by 6 G. I., c. 23, which was followed by the ... G. II., c. 15, inflicting death on all convicts who neglected to ...anish themselves, according to the condition of their pardon, ... returned before the expiration of the term of transportation. When the American war broke out, it was necessary to make ...new arrangements in relation to transportation; and to meet the ...ltered state of things, the 16 G. III., c. 43, was passed, which ...re-established the Hulks as a place and mode of punishment. ... was shortly followed by the 19 G. III., c. 54, which was the ... Penitentiary Act. Then came the 24 G. III., c. 56, con-...ining a variety of regulations in reference to transportation. It was under this act that convicts were first sent to New South Wales. The 25 G. III., c. 56, was confined to Scotland. The ... G. III., c. 156, superseded 24 G. III., c. 56. The 56 G. III., ... 156, established a permanent Penitentiary. Then came the ... G. III., c. 101, which was the first act in which transporta-...on from the Colonies was mentioned. It provided for the ...prisonment in England of convicts adjudged to transporta-...on by any Court in any part of His Majesty's dominions ...yond England and Wales, and brought to England in order ...o be transported: and it contained a recital similar to the 17 ...c. of 5 G. IV., c. 84. The 1 and 2 G. IV., c. 6, continued ...he 56 G. III., c. 27; 25 G. III., c. 46. 59 G. III., c. 101; 28 G. ...III., c. 24; and 43 G. III., c. 15. And that statute was followed ... the act now regulating transportation, the 5 G. IV., c. 84. These were all the acts relating to transportation passed by the Imperial Parliament; and they contained no express power ... the colonies to transport, but two of them impliedly recog-...sed such a power by providing for the detention of convicts ... transported, and in the course of transit here. The pardon, ...erefore, would have been good in Canada: and, if so, all ...eps subsequently taken in execution of it, must be equally ...lid. The prisoners were here in such execution, and the ...ourt could not discharge them. They were in transit to ...eir destination. The Crown, by its prerogative, had the ...wer of carrying into effect the sentence, when the criminal ...d left the colony. With respect to the late Indemnity Act,

1839.

QUEEN v. BATCHELDOR.

referred to by the counsel for the prisoners, the grounds of the illegality of the Ordinance were not declared in it; and the real reason upon which that Ordinance was declared invalid was, that it committed the great injustice of condemning the persons described in it in their absence, unheard.

4th objection. Conduct of the transportation.

But then, 4thly, it was said that the conduct of the transportation had been irregular and unlawful. It had been contended that the Governor of Lower Canada had no right to interfere. But having established that the sentence was legal, it followed that all means necessary to carry it into effect, were also legal. It was expressly averred in the return, that there were no direct means of transport from Canada to Van Diemen's Land That averment must now be taken to be true. How was the sentence of an inland province to be carried into effect? It could only be done by the Executive Government conveying the prisoner from state to state, till he reached his destination. Here the prisoners had been sent to the sheriff of Quebec, the convenient and proper custody for the purpose. They were in execution of a lawful sentence, which could only be carried into effect by the intervention of the executive authority in the intermediate states. And therefore the Governor of Lower Canada was perfectly justified—nay was actually bound, to interfere. It had been said that a warrant of committal was necessary. But no such instrument was required where prisoners were *in execution*. In the passage referred to from Blackstone's Commentaries *, it was expressly said, that no warrant was necessary when persons were in custody under process of a Court. Here the prisoners were detained by virtue of proceedings tantamount to conviction in Court. They were in execution. The proposition contended for on the other side, that a warrant was necessary in all cases where it could be obtained, was too wide. One exception could be found in the very case mainly relied on for the prisoners, R. *v.* Clarke †, viz., of commitment for contempt; in which case the authority was express, that a

* 1 Vol. 136; see ante, p. 52.

† 1 Salk. 349; ante, p. 54.

1839.

QUEEN v. BATCHELDOR.

warrant was not needed. Other cases might be put. But, at any rate, it was clear that in the present case, where the prisoners were detained under what was tantamount to a sentence of Court, a warrant was unnecessary, and therefore need not be returned.

5th objection. Return did not set out documents.

Lastly, It had been objected, that the return was not sufficiently explicit, in not setting out verbatim the warrant and other documents. But it was clear, according to the authorities, that the return was quite precise enough. It related the whole truth of the matter, and conveyed sufficient information to enable the Court to see the grounds and validity of the detention of the prisoners. It had been said, in another part of the argument, by the counsel for the prisoners, that the gaoler was necessarily ignorant of the circumstances, and they had complained of his affecting to refer to matters on which he could not possibly possess any authentic information. And yet here they objected that he should set out all the documents, which were not in his possession! The objections were inconsistent and self-destructive. The case of R. *v.* Suddis* was decisive against this objection, and indeed the preceding one also. There, a writ of Habeas Corpus had issued to Sir William Pitt, the governor of Portsmouth, to bring up the body of John Suddis; and the return set out the proceedings of a Court-martial at Gibraltar, at which it appeared that the prisoner was found guilty of receiving goods, knowing them to be stolen, in breach of the articles of war, and that the Court had sentenced him to be transported to Botany Bay for fourteen years. The return went on to state, that such sentence had been approved of by the governor of the garrison, and that he, to carry out the sentence, caused Suddis to be sent to England, in the custody of Lieutenant Rogers; and that the prisoner having arrived in Portsmouth, was detained by Sir William Pitt, as governor of Portsmouth, until he should be sent to Botany Bay, in pursuance of his sentence. In that case there was no warrant, nor, of course, any returned. The return only alleged that the governor of Gibraltar had

* 1 East, 306.

1839.

QUEEN v. BATCHELDOR.

delivered Suddis into the custody of Lieutenant Rogers, and had sent him to England, and that, having arrived in England, he was detained by Governor Pitt, to be safely kept till he was transported. This return was held good, and Suddis was remanded in execution of his sentence. His counsel was Mr. Erskine, who would have urged any possible objection in his behalf that zeal and acuteness could supply. Many objections he did make, but not this one of the want of a warrant on the return. Lord Kenyon, in giving judgment, said, "The natural leaning of our minds is in favour of prisoners; and in the mild manner in which the laws of this country are executed, it has rather been a subject of complaint by some, that the Judges have given way too easily to mere formal objections on behalf of prisoners, and have been too ready, on slight grounds, to make favourable representations of their cases. We must, however, take care not to carry this disposition too far, lest we loosen the bands of society, which is kept together by the hope of reward and the fear of punishment." And afterwards he said that the Court was "not to hunt after possible objections" to a return. And Mr. J. Grose said, that it was "enough for the Court to find a sentence pronounced by a Court of competent jurisdiction to inquire into the offence, and with power to inflict punishment. As to the rest, all must be presumed to be *rite acta*." And Mr. J. Lawrence, in reference to one of Erskine's objections, viz., that the return did not show that the principal in the theft had been convicted, which was a necessary preliminary to warrant the conviction of Suddis as the receiver of the goods, said he could not admit the validity of that objection. "This is a return," he observed, "to a writ of Habeas Corpus, made by the person in whose custody the party is placed in execution of his sentence. He cannot be taken to be cognisant of all the proceedings. It is enough that the Court had authority to award such a sentence. He returns the cause for which he detains the party in custody, viz., the judgment of such a Court. This return, I believe, is as much as it has ever been usual to make in such cases." And

1839.

QUEEN v. BATCHELDOR.

Mr. J. Le Blanc, in reference to another objection, that it did not appear by the return that the party had ever been charged with the offence of which he was convicted, observed that the answer to it was, "that it is sufficient for the officer having him in his custody to return to the writ of Habeas Corpus, that a Court, having a competent jurisdiction, had inflicted such a sentence as they had authority to do, and that he holds him in custody under that sentence." The return in the present case was drawn up precisely in the same terms, and was framed indeed on the model of that case. The doctrine there established was quite consistent with older cases; as, for instance, Barnes's case *. There a Habeas Corpus had been directed to the Warden of the Cinque Ports to bring up the body of B., and certify the cause of his imprisonment; and he accordingly returned, that the Warden has a Court of Admiralty for sea causes within his jurisdiction of the Cinque Ports, *infra fluxum et refluxum maris*, and has an officer appointed to seize goods, &c., cast on the shore by the sea; and that an anchor was cast on the sea *infra*, &c., and that B. had carried it away; upon which, process issued to summon him to the Admiralty, and the Warden adjudged that he should be imprisoned till he restored the anchor, or paid £10 to the Warden. Several exceptions to the return were taken by Crook, but the Court said, "As to the exceptions taken to the manner of proceeding, it appears by these words, *consideratum est*, that a judgment was given against him, and although the manner of their proceeding be not consonant to our law, yet we cannot redress the party by the course now taken, —that is to say, by a Habeas Corpus; and a return differs from other judicial proceedings, vide 8 Coke, the case of the city of London, *and such precision certainly is not requisite in returns, but it is sufficient if the Court can, by the return, be apprised of the substance of the matter.*" The cases referred to on the other side were not in point. The ground on which the Court quashed the return in Bushell's case † was not that *that* instrument was defective, but that the order of the Court

* 2 Rolle's Rep., 157. † Vaughan, 135.

1839.

QUEEN v. BATCHELDOR.

which it set out was bad for uncertainty. So in Seeles's case * the real ground of the decision was that the Council had no jurisdiction. The three cases referred to in the 4th volume of Barnwell and Alderson only decided that the return, in cases of smuggling, must show that the provisions of the Revenue Acts have been complied with, on which there could be no doubt. Here the return had set out the truth of the matter, which enabled the Court distinctly to see that the prisoners were in execution of what was equivalent to a sentence of a competent Court, and that was sufficiently precise according to the express decision of the case of R. *v.* Suddis.

Prisoners, at all events, not entitled to their discharge.

The various objections, therefore, raised to the return were invalid; but even if they were not, and admitting for the moment that the return must be quashed by the Court for insufficiency, yet the prisoners would not be entitled to their discharge. It appeared to the Court from the return, that they were in custody on a charge of high treason, for which they had been indicted, and which they had confessed, committed within the dominions of her Majesty, for which, if the pretended statute were a nullity, and if they renounced the conditional pardon, they were liable to be tried in England or Canada. The 16th sec. of the Habeas Corpus Act expressly provided that "when any persons had *committed* treason in any of the plantations, they were to be sent to such place there to receive trial as might have been done before the Act." The word "committed" must mean when the Court had sufficient grounds to believe the offence had been committed. Therefore, on the supposition that the counsel for the prisoners were successful in their objections that the Provincial Act was void, and the pardon invalid, if dissented from by the prisoners, they would then be in the same situation as if they had been merely indicted; and with this indictment found, according to the 16th sec. of the Habeas Corpus Act, the prisoners could not be discharged. If the proceedings hitherto had been irregular, they were still amenable to justice, and must be tried. If they would persist in renouncing the merciful alteration of their sen-

* Cro. Car.

1839.

QUEEN v. BATCHELDOR.

tence, they must still submit to the law, and be forthwith put upon their trial. In Rex *v.* Kimberley*, the defendant was brought up by Habeas Corpus, having been committed for feloniously marrying against the Irish Act, in order that he might be sent to Ireland to be tried. Strange moved that he might be discharged or bailed, because the power of the judges was confined to offences committed in England against the laws of England, and the law gave them no power to interfere with crimes committed in Ireland. "Sed per Curiam: It has been done in Colonel Lundy's case, 2 Vent. 314; and in 3 Keb. 758, the Court refused to bail a man committed for a murder in Portugal. If application is not made to have him let out in a reasonable time, you may apply again." Therefore the defendant was remanded, and afterwards sent over to Ireland and condemned and executed. In Rex *v.* Platt †, the return to a Habeas Corpus stated that Mr. Addington, a justice of peace, had committed the prisoner for high treason committed at Savannah in Georgia in North America. He had been committed to Newgate, and had appeared before the Judges of oyer and terminer and general gaol delivery at the Old Bailey, and had prayed to be tried or discharged. The Judges would neither try nor discharge him, and upon a subsequent application for his discharge he was remanded. There, there was only a warrant from a Middlesex magistrate for high treason committed in America, and although perhaps it was difficult to see how such a magistrate could have any authority to issue a warrant for an offence committed out of his jurisdiction, yet as it appeared that the prisoner was committed for high treason, the Court refused to discharge him. In Rex *v.* Marks‡, the prisoners had been brought up by Habeas Corpus, and the return set out a warrant of commitment for a felony in an unlawful combination against 37 Geo. III., c. 123. The Court held the warrant informal, and yet as the corpus delicti appeared to the Court in the depositions returned, they would not discharge the prisoners. Grose, J. said, "There is no doubt as to the power of the Court in remanding the prisoners,

* 2 Strange, 848. † 1 Leach's Crown Law, 157. ‡ 3 East, 157.

1839.

QUEEN v. BATCHELDOR.

notwithstanding the warrant of commitment be defective,—and it is the constant practice of the Court to remand prisoners in such cases, if it appear, on reading the depositions, that there is a fair ground to authorise them." In Ex parte Krantz*, where persons were detained without any warrant on board one of his Majesty's ships of war on a charge of smuggling, and on suspicion of murder, and, on being brought up by Habeas Corpus, it appeared by the return that the prisoners might be guilty of the offences imputed to them, the Court refused to discharge them out of custody, and committed them to the marshal, in order that they might be taken before some competent authority, to be examined touching the matters contained in the returns, and to be further dealt with according to law. These cases therefore clearly established the duty of the Court to take care that persons already indicted of high treason should not be let at large, even although the return to the writ of Habeas Corpus might be informal. The most dangerous consequences would follow indeed if that were the law. The prisoners in this case, therefore, if they persisted in their refusal to abide by the gracious pardon of the crown, must be detained by the Court, in order that they might be tried of the high offence for which they stood indicted.

1st and 2nd objections.

HILL, in reply. As to the 1st and 2nd objections. It was perfectly competent for the prisoners to refuse their assent, or after assent to revoke it, to the terms on which the pardon had been granted, if they thought fit. For, at common law, the crown could not, either before or after conviction, substitute one form of punishment for another *in invitum*. The doctrine asserted on the part of the Crown, was indeed limited to life and limb. But where was the authority for that limitation? It was merely invented with the original doctrine; for in no decision of a Court, no dictum of a judge, nor any assertion of any text-writer, good or bad, was a trace of either the doctrine or limitation to be found. As to any argument derivable from practice and usage, instances of submission by guilt and poverty were not to be urged as evidence of a course of law. And

* 1 B. and C., 258. And see also Ex parte Scott, 9 B. and C. 446.

still less could any authority be derived from the common law in favour of the royal prerogative to inflict compulsory transportation, as that was a mode of punishment of comparatively modern date. The pardons referred to by the counsel for the crown were cases where the parties had voluntarily acted on the condition. The statutes referred to, viz. 20 Geo. II., c. 46, and the Irish Act 38 Geo. III., c. 73, were conclusive *against* the position contended for by the Crown, because they showed the necessity of legislative interference to *compel* the execution, or to punish the infraction, of the condition.

3dly. The Provincial statute was full of difficulty and ambiguity. The pardon was to be on "such terms and conditions as might appear proper." But proper to whom? To the governor and executive council? Or was the prisoner to be a party? as would seem to be supposed, from a *contract* being relied upon; and by what rule or test was the propriety to be ascertained? The counsel for the crown chose again to insert a limitation, and the terms were to be "known to the law." But this interpretation could not meet the case of the man sentenced to a certain term, "after his arrival" in Van Diemen's Land; for that was a punishment clearly *not* "known to the law." And then the interpretation was to be shifted, and the act could include such a case, because, as transportation for life might be inflicted, any inferior punishment might be. But the objection to that sentence was not that it was for too long or too short a period, but for an uncertain one, making the punishment depend not on the moral guilt of the criminal, but on the acts and caprices of others, or on the accidents of winds and waves. The act, too, was repugnant to the principles of English law, for at one stroke it levelled all those defences by which the jealousy of the constitution had guarded persons under a charge of treason. The policy of the law of England was to restrain the dominion of the subject over his own person within stricter limits than over his property. He could not bind himself to abandon his calling in life. He could not restrain his right of marriage; none of these acts could he do when at large and sui juris. Yet here, with a

3rd objection.

1839.

QUEEN v. BATCHELDOR.

charge hanging over him, in prison, and it might be, shut out from all communication with his friends, he was invited to surrender himself to bondage and labour for the whole of his life. It was therefore strictly a *penal* statute, and as such, to be construed with the greatest severity of interpretation. The 5 Geo. IV. c. 84, s. 17, was mainly relied on to show that transportation might come within the operation of the Provincial Act. But arguments founded on supposed legislative recognitions were extremely dangerous. The act recited that "laws were in force," authorising transportation from the colonies. So they might be, without having a legitimate operation, because they might never have been questioned. But if there were such "laws in force," where were they? It was the duty of the counsel for the crown to show them. They could only be laws of the Imperial Parliament, and let them be pointed out. Transportation from India was expressly sanctioned by the 39 & 40 Geo. III., c. 79, ss. 13 and 14, and that statute satisfied the recital. But if the recital really intended to state that the Colonial legislatures had the power of passing acts sanctioning not banishment, but transportation, and affecting to deal with criminals when under the operation of another province, or of the parent state, it was a clear mis-statement of the law, by which the Court was not bound. Recitals in acts of parliament were not binding, when against the law or fact. Plowden, in his report of the case of the Earl of Leicester *v.* Hayter*, expressly says:—"And further they said, that if the reference to the record had been left out, and the act had absolutely recited that the plaintiff was attainted of treason, and had confirmed it, yet the plaintiff might say that he never was attainted of treason, and so avoid the act entirely; for this recital cannot be taken to proceed but upon information, *and the Court of Parliament may be misinformed as well as other Courts; and when they have recited a thing which is not true, it cannot be otherwise taken but that they were misinformed*, for none can imagine that they would purposely recite a false

Recitals not binding.

* Reports, p. 398. And see also the case of the Baron de Bode, vol. 6, Dowling's Prac. Cas., p. 785.

thing to be true, for it is a Court of the greatest honour and justice, of which none can imagine a dishonourable thing. And forasmuch as the legislature always have justice and truth before their eyes, and their false recitals (if there are any) are made upon false information, thence it follows that they do not intend any one *to be concluded by such recital*, grounded upon falsehood: for he that says to the contrary, affirms that their intent is to oppress men wrongfully, which is indecent to be said of them; and he who insists that some shall be concluded by such falsehood, impugns the intent of the makers of the act itself, for the act is nothing else but the intention of the makers of it."

Many instances of flagrant violations of fact might be found in the recitals of various statutes*. The most striking instance, perhaps, was the well known statute 31 Hen. VIII. c. 13, which abolished the superior monasteries. That veracious act recited "that where divers and sundry abbots, priors, abbesses, prioresses, and other ecclesiastical governors and governesses, of divers monasteries, abbathies, priories, nunneries, colleges, hospitals, houses of friars, and other religious and ecclesiastical houses and places within this our Sovereign Lord the King's realm, *of their own free and voluntary minds, good wills, and assents, without constraint, co-action, or compulsion, of any manner of person*," had granted their franchises and revenues, &c., to the king.

The legislature here, if it intended the position contended for by the crown, was clearly mistaken; and having only recited, and not enacted nor declared, was not binding on the Court. As this was the main reliance of the crown, coupled with the argument founded on usage (which had been already disposed of), it was unnecessary to repeat the positions asserted in the opening of the argument, as to the utter inability of any Colonial legislature to pass laws operating *extra territorium*. As to Lord Durham's Indemnity Act, whatever other objections there might have been to his Ordinance, the ground on which that statute passed was clearly the want of power in

* See Barrington's Observations on the Statutes, p. 328.

1839.

QUEEN v. BATCHELDOR.

the legislature of Lower Canada to enforce its acts beyond its territorial jurisdiction. This appeared from the declarations of every member of both Houses, who took part in the debate; and as Parliament were deciding upon the law as it stood, and therefore acting judicially, it was as competent for counsel to cite the opinions of members, as it was to cite the reasons given by the judges in support of their judgments.

4th objection.

4thly. No doubt a warrant was necessary to evidence and justify the detention of the prisoners. They were *not in execution*. Nothing like a sentence, nothing analogous to it, had taken place. For the doctrine of equivalents was not yet adopted into our penal law. The position originally asserted must be repeated; that the law in all cases, except of an overruling necessity, required a warrant to justify restraint. The case put of a committal for contempt was no exception. There the record made in Court by its officer was the warrant. And even in cases of execution, the exception relied on for the crown, a warrant was necessary. The judges' minute on the calendar, which was the sheriff's authority, was a warrant. If ever any proceedings were taken afterwards in relation to such an execution, a legal instrument might be drawn up to justify it, founded on the minute, as with convictions by magistrates.

5th objection.

5thly. The cases relied on were not sufficient to justify the position of the crown. Barnes's case* was in the main clearly bad law; for it supported an adjudication by the warden in his own cause. Besides, it grounded itself on the case of the City of London, as reported in 8 Coke†. But on an examination of the report of that case in 2 Brownlow‡, it appeared that the prisoner was *discharged*, on the ground that the return was not sufficiently precise: a result which Lord Coke leaves in doubt. The return there had justified the detention of one Waggoner, because he had been committed by the mayor and aldermen for keeping a shop and using the mystery of making candles. But as it did not aver that he had used the trade of a tallow-chandler, it was held insufficient,

* 2 Rolle's Rep., 158. † P. 121. ‡ P. 284.

1839.

QUEEN v. BATCHELDOR.

as such a user of trade could not be inferred from the allegation that he had made candles, which might have been for his own private consumption. And this was the case on which Barnes's case had rested, but which was clearly misunderstood by the Court. And with respect to R. *v.* Suddis*, which was the corner-stone of the counsel for the crown, it was clearly distinguishable from the present. The point now raised, and to establish which it was cited, was never suggested, argued, nor decided in it. The counsel for the crown, indeed, claimed the benefit of that omission from the eminent character of the advocate for the prisoner, Mr. Erskine. In admiration of that great man, all would unite,—but he must protest against the dangerous and unwarrantable doctrine, that a case was to have the effect of a judgment upon a point never mentioned in it, because some great advocate had omitted to urge it. Such a mode of making the law, would place the rights and liberties of Englishmen on a very dangerous foundation. But Mr. Erskine's omission could easily be accounted for, without supposing any inattention to the interests of his client. The point which it was supposed he had purposely avoided, would not, if taken, have placed his client in any more advantageous position. Suddis was a soldier, and therefore, even if he had been illegally brought from Gibraltar to Portsmouth, he could not have been *discharged*, but sent back again to Gibraltar, under military rule, as a *felon*. The only use of the Habeas Corpus to him, was not, as here, to effect his *discharge*, but to *quash his conviction of felony*. Unless the *judgment* against him could be got rid of, his condition could not have been in the least degree altered for the better. Erskine therefore addressed himself to that practical object: he endeavoured to quash the judgment as illegal. If he had succeeded in that, his client would have been freed from his punishment as a felon; but if he failed in that, what was the utility of taking a point, of which the only result of a decision in his favour would have been to send Suddis back to Gibraltar, instead of to Botany

* East, 157.

1839.

QUEEN v. BATCHELDOR.

Bay, *as a felon?* If the judgment against him was legal, it was immaterial to Suddis, whether he was at Gibraltar or Botany Bay. The motive and object of Erskine in not urging the point now raised, was therefore quite intelligible; and the case of R. *v.* Suddis had not the slightest application whatever to the present.

As to the discharge of the prisoners.

Lastly, with respect to the new objection raised on behalf of the Crown, that even if the return was quashed for insufficiency, the prisoners must nevertheless be detained,—the answer was clear and direct. If the return was quashed, it was non-existent. It was a piece of pleading, and a pleading was nothing unless good *as* a pleading. It was not good by way of *evidence*—it had not even the force of an affidavit. It was not on oath,—and the supposed facts included in it were many of them clearly not within the knowledge of the party making the return. The cases referred to were all clearly distinguishable,—upon this important ground common to them all, viz., that the prisoners there *had been never tried.* All the proceedings were *preliminary.* There had been no investigation. Besides, in those cases where there had been depositions, they had been returned by *certiorari*, with the Habeas Corpus, and the Court could therefore judge for itself, on the authentic documents, as to the validity of the detention, which was only precedent to a trial. In R. *v.* Marks*, and R. *v.* Krantz†, this was the case. The Court saw, from the depositions and proceedings returned, that there was a *corpus delicti* not yet inquired into, and therefore very properly put the prisoners *in a course of trial.* No proceedings like a trial had ever been taken place. The cases had never been inquired into. In R. *v.* Kimberley‡, the party had never been tried. In R. *v.* Platt§, the real ground on which the Court proceeded was, that the judges of *Oyer* and *Terminer* at the Old Bailey had no power to try the party for the treason abroad, or to interfere. They had no jurisdiction whatever in the matter. Besides, it was not a case of Habeas Corpus at all.

All those cases were therefore clearly distinguishable from

* 3 East, 157. † 1 B. and C., 258. ‡ 2 Strange, 81[illegible]
§ 1 Leach's Crown Law, 157.

1839.

QUEEN v. BATCHELDOR.

the present. Here the case of the parties had been inquired into. Here the Court had none of the documents either set out in the return, or brought up by *certiorari*, from which they could themselves see anything which might justify the detention of the prisoners. The principle of law was this, that the Court could not detain persons on insufficient returns, unless they could also see, from authentic instruments, duly brought up before them, and which it was incumbent to bring up, if they could be had, that there was a *corpus delicti* charged against the persons applying for the Habeas Corpus, not yet enquired into. Unless the Court could see that fact from the proper instruments, they could not act on the return. if informal, even although they could see, *from the return*, that the person was probably rightly detained. In Nash's* case, Lord Tenterden said that the circumsrances stated in the return seemed quite sufficient to warrant the commitment: and yet, as the allegations were not sufficient in law to make the return a proper legal instrument, the prisoner was discharged. So in Deybel's cases †, and Souden's case ‡. Here the return was clearly bad, and the prisoners must therefore be discharged.

On the 21st of January, Lord DENMAN delivered the judgment of the Court as follows:—

Judgment.

We are now to pronounce our judgment on the validity of a return to a writ of Habeas Corpus for bringing up the body of Randal Wixon, being in the custody of the keeper of Her Majesty's gaol at Liverpool.

As to writ being issuable in vacation.

The writ was issued by Mr. Justice Littledale, returnable forthwith before himself at his chambers in Serjeant's Inn, but the term was so near at hand, that it was thought expedient to hear the argument in the full court. Every point that could arise upon the facts that appear has been amply discussed, and as some doubt was expressed on the right of my learned brother to issue this writ, we desire to state our deliberate opinion, that he has done no more than the law justifies and requires. We deserve herein neither the praise nor the censure that may belong to innovation; we are merely

* 4 B. and A., 295. † Ib., 245. ‡ Ib., 294.

1839.

QUEEN v. BATCHELDOR.

abiding by an established practice. Lord Coke, indeed, and Lord Hale, and Lord Chief Baron Comyn, as text-writers upon this subject, appear to confine to Chancery, which is at all times open, the officina justiciæ, the power of issuing a Habeas Corpus in time of vacation. But Hemain's Pleas of the Crown contain four precedents of writs in the exact form of that now before us, earlier than 31 Car. II. c. 2, one as early as the 43d Elizabeth. Wilmot, in his answer to the House of Lords, refers to others anterior to the Habeas Corpus Act, and observes, that the great men who framed it would never have left so obvious a defect without remedy. In 1758 he and the Judges, consulted by the House of Lords, affirmed this power, and the reforming bill which had been introduced would scarcely have been suffered to fall, had it not been in that respect deemed unnecessary. In 1765, then, Blackstone's statement is a valuable testimony of the general opinion at that time; and the practice from that period has been uniform. It is also true, that in deciding Crowley's case*, Lord Eldon doubted the power of a Judge in vacation to issue a Habeas Corpus, saying, there is much good principle for it, but very little practice. That doubt assisted his argument in favour of overruling the solemn decision of Lord Nottingham in Jenks's case; but the passages in his judgment which occur at page 65 and page 68, distinctly prove that he formed his opinion partly on the inconvenience and oppression which might have accrued to the subject, if deprived of the means of obtaining ease from imprisonment in time of vacation by a writ sued out in the Court of Chancery. Now the same ill consequences would follow in criminal cases, notwithstanding the power of issuing these writs in vacation by Chancery, unless the Judges of the Court of King's Bench have power to decide immediately on the right to restrain a subject of his personal freedom. In favour of this practice we have the authority of Lord Nottingham himself, who, in his judgment, preserved by Mr. Swanston, mentions that precedents of such writs being issued by Kelynge, C. J., were brought before him. He says, indeed, that Rainsford, C. J., had refused a Habeas Corpus to

* 2 Swanst., 1.

Jenks, but not because he doubted his power to do so. It is far more likely he did not choose to enter into a controversy with the Privy Council, by whom Jenks had been committed. In fact, therefore, there is no decision against this doctrine, and in its favour great authority, principle, necessity, and very early precedent, continued to the present hour.

Return.

"We proceed, then, to examine this return, which in substance states, that after the insurrection in Upper Canada was suppressed in that year, the legislature authorized a pardon to be granted by the Governor to such persons charged with high treason as should, before arraignment, confess their guilt and petition for a pardon, on such conditions as should seem fit; that Wixon was accordingly charged and so pardoned, on condition of being transported to Van Diemen's Land for his life; that for want of the means to convey him thither directly, he was first taken to Quebec, in Lower Canada, then embarked to England, and there kept in safe custody, in Liverpool gaol, being a secure and convenient place for the purpose of detaining him, while necessary preparations were made for transporting him, in fulfilment of the condition of his pardon. Some general observations are material to be made. The return must necessarily be received as true in all the particulars that appear upon it in the present stage, in which its sufficiency alone is examined.

We are sitting as on a demurrer, or a writ of error on the judgment of another Court.

We must also bear in mind, that the matter for our consideration is not the code by which the law of this country may require its ministers to proceed in certain cases, but whether, under the circumstances of this prisoner, he can justly complain that he is injured, and has a right to be set free.

Canada not a foreign state.

Obviously, there is a broad distinction between the duties which a state may enjoin on persons in authority for purposes of its own, and the powers of which it may permit the exercise for any lawful purpose. The difficult questions that may arise touching the enforcement in England of foreign laws, are excluded from this case entirely, for Upper Canada is neither a foreign state, nor a colony with any peculiar customs. Here

1839.

QUEEN v. BATCHELDOR.

are no *mala prohibita*; by virtue of arbitrary enactments, the relation of master and slave is not recognized as legal, but acts of parliament have declared that the law of England and none other shall there prevail. The consequence is, that we can take judicial notice of their legal proceedings, can understand the language they employ, and must, according to all former practice, make every reasonable intendment in support of their validity.

Objections to Provincial Act.

"The Legislative Act under which the pardon was granted, was, however, said to be absolutely void for two inherent vices: 1st. That by the law of England no man can contract for his own imprisonment.

"This dictum of C. J. Hobart, founded on older authorities and on principle, was cited by Mr. Hargrave in his celebrated argument in the case of James Summerset. It made out his point, that even if the negro had sold his freedom, our law would hold the bargain void; but it really has no application to the case of a man charged with a crime, but permitted by the law to confess it before arraignment, and so enabled to obtain a pardon by which his life is spared, but he binds himself to undergo a less severe punishment.

"The second objection was to the enactment that persons may be pardoned 'on such conditions as may seem fit;' as if it introduced a power of punishing in a manner unheard of in our procedure, and would legalize even torture and mutilation. But we are of opinion that these barbarous practices are impliedly excluded from the enactment, unless it should actually express them. There is no doubt that transportation was intended, for that mode of punishment is mentioned in the second section of the same act. It appears from former acts passed in Canada to have been in force there; and the 5th Geo. IV. c. 84, s. 17, proves the frequency of transporting to the penal settlements for offences committed in certain colonies belonging to her Majesty: while it is notorious that the substitution of that punishment for the loss of life has been constantly, during a long course of years, an acknowledged practice in this country. Another objection drawn from a different provision of the act,

that the pardon was made equivalent to an attainder in respect to property, and therefore could not affect the person, was not much pressed; as this proceeding is in no degree connected with the principles of attainder.

Objection to uncertain punishment.

"Objections were raised to the condition of the pardon both in respect to the time and the place of transportation. The time is 14 years, to be reckoned 'from the arrival of the party' in Van Diemen's Land; thus depending on accident, or perhaps postponed by wilful delay, and void for the uncertainty.

"The answer given at the bar, appears to us satisfactory; that as the transportation may be for time of life, it may, *a fortiori*, be for any shorter period. It was then said, that the power to receive the convict at Van Diemen's Land, the place of his destination, ought to appear in the letters patent granting the pardon. We do not think it necessary. Her Majesty has power by law to make that settlement a receptacle for persons transported under sentence, or after a commutation of their punishment, and we can have no difficulty in presuming that all due preparations and provisions for that purpose have been made.

Objection as to defect of return in not setting out documents.

"The return was challenged for the want of every one of the numerous documents, whence the right to imprison was inferred. The indictment for treason, it was contended, ought to have been recited, if not set forth in terms; the petition, the confession, the pardon, the assent (though that indeed is not required by the act). We were told that it was our duty to inspect these papers, and not receive a merely general description from the party imprisoning; that we might judge for ourselves whether the description was correct, and whether they really conferred the authority ascribed to them.

"To this manifold objection, one answer must serve. The fact is stated to the Court upon the return, and we are bound to receive it as true. The party who makes the return, has probably never seen the documents; but at his peril places his confidence in the captain who brought the prisoners from Canada, or in some other person: but he is bound by the

1849.

QUEEN v. BATCHELDOR.

assertion which he makes on their credit; and their truth may be questioned in any ulterior proceeding which it may be competent to the party to adopt.

Objection; transportation not properly conducted.

"The last head of objection is, that the authority to transmit the prisoner to the various custodies in which he has successively been placed, does not properly appear. The treason was committed in Upper Canada, and there confession was made, and the conditional pardon granted.

"How then, it is asked, could the governor of Lower Canada be justified in receiving him, and transmitting him to England? and how can the gaoler of Liverpool restrain his person in this country, the more especially as Sir John Colborne's letters patent are directed in terms to 'such persons in England as may be lawfully authorised to receive him,' and no warrant is even pretended to have been directed to the gaoler of Liverpool, nor does he even allege himself to be a person answering that designation?

"We answer, that as soon as the conditional pardon had been granted on the prisoner's petition, the crown had a right to enforce the condition, and to take all necessary steps for that purpose. The circumstances confer the authority, and no warrant could enlarge it.

"Sir John Colborne, whose letters patent are addressed to persons having authority to receive, had in himself no more authority to receive than the person who now detains the prisoner. As it is physically impossible to embark at once for Van Diemen's Land from Upper Canada, in every intermediate territory where the prisoner was confined in the necessary performance of the condition to which he had lawfully bound himself, he was lawfully confined. And the 5 Geo. IV., in the section before quoted, shows that transports from the colonies on commuted sentences had been habitually received in England in their passage to the penal settlements. The result is, that the person making this return is justified in rendering his assistance to the captain of the vessel which has brought the prisoner from Lower Canada, in detaining him, and to such

Prisoner remanded

1839.

QUEEN v. BATCHELDOR.

other as may be employed to carry him to Van Diemen's Land, and that the prisoner must be remanded to his custody.

"We have selected the case open to the most numerous objections for our first judgment. Eight others, viz., John G. Parker, Finley Malcolm, Robert Walker, Paul Bedford, Leonard Watson, James Brown, John Anderson, and William Alves, must be disposed of in the same manner for substantially the same reasons. Three, viz., John Grant, L. W. Miller, and W. Reynolds, have not been pardoned under the legislative act, but according to the ordinary practice, as stated in the return, after being duly convicted at a court of session, and oyer and terminer at Niagara, in Upper Canada—one of them of treason, the other two of felony. We have carefully considered whether these allegations are sufficient, and on the principles already stated we think they are. On this point we rely on the principle laid down in Barnes's case, that returns to the writ of Habeas Corpus do not require minute correctness, if the substance of the facts is stated; and on the precedent acted upon in R. *v.* Suddis, where similar allegations, but still looser, were sanctioned and held good. These then must also be remanded."

Motion for an attachment against Mr. Batcheldor for a false return.

HILL then moved for an attachment against Mr. Batcheldor, on the ground that the return placed on the files of the court was false, and false to his knowledge.* He moved, on an affidavit of Mr. Waller, clerk to Messrs. Ashurst and Gainsford, the solicitors of the prisoners, by which it appeared that the governor of Liverpool gaol had given them a copy of the warrant, which was referred to in the return as justifying and commanding the detention of Leonard Watson; whereas it appeared on an examination of the warrant that the name of Watson was omitted in the mandatory part. Mr. Batcheldor must have known of this omission, and yet he affected to inform the court that Watson was held in restraint by virtue of this

* See R. *v.* Colvin, 8 Mod., 226. R. *v.* Wright, 2 Stra., 915; and R. *v.* Earl Ferrers, 1 Bun., 631, for cases of attachment against gaolers for *not returning* the writ.

1839.

QUEEN v. BATCHELDOR.

warrant. He contended, that indeed the principle of the writ of Habeas Corpus required the gaoler to verify the return in the first instance by affidavit. The crown, by its judges, was entitled to know the cause for which any one of its subjects was held in restraint; but how could they proceed on information, which ought alone to satisfy them on such a matter, when they found Mr. Batcheldor asserting circumstances of which he could not possibly know anything specific? The notion that a return to a Habeas Corpus was conclusive as an answer to the writ, if good on the face of it, was of modern origin; as might be seen in a very important case, of considerable antiquity, viz. *Andrew De Vine's case*,* where the return was replied to, and the whole matter convened, as on pleading. This was one of the earliest cases to be found on a writ of Habeas Corpus, and Fortescue was one of the judges who took part in it. There was then no idea in the courts that the allegations of a return are not traversable. A return was a piece of pleading, and nothing more. It was, therefore, open to *traverse* like any plea. But if it might be traversed by written pleading, *à fortiori*, when the purposes of justice required it, in interlocutory proceedings, it might be also controverted by affidavits. In *Sir William Chaworth's case*,† the party had been imprisoned by the High Commission Court established by the 1 Eliz. c. 1; and upon his being brought up by Habeas Corpus, it was held, that the return was not sufficient, as it did not mention that four, at least, of the commissioners were present, which is required by their commission, although not by the statute; and into which, though not set forth in the return, the court looked. In *Hutchins* v. *Player*,‡ where *De Vine's case* was mentioned, Player was in the custody of the corporation of London, in respect of some action then pending in the city Courts. He claimed privilege as being a suitor in the Common Pleas, and sued out a writ

* It happened 34 Hen. 6, and is particularly mentioned by Sir Orlando Bridgman. See his Judgments, p. 288, in the case of *Hutchins* v. *Player*. A full statement of the case, as detailed in the argument, will be found *ante*, p. 7.

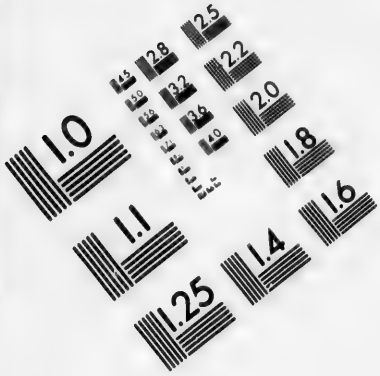
† 12 Co., 82. ‡ Bridgman's Reports, p. 274.

of Habeas Corpus in that Court; for at that period* a notion prevailed that the Courts of Common Pleas and Exchequer had not a general co-ordinate jurisdiction on this subject with the King's Bench, but that it was necessary to ground their power on the privileges of the suitor. In that case Sir Orlando Bridgman examined the return, very much as had been done in *Vine's case*, on which he grounded himself. The facts alleged were found to be true, and the party was remanded. In *St. John's case*†, a man named Gardener, obtained judgment in the King's Bench against Mr. St. John, a justice of peace, and having a *capias* against him, got a warrant, directed to a special bailiff, who, fearing resistance, came near to the residence of Mr. St. John, armed with a short gun. St. John arrested the servant, finding him armed, and he was committed by the nearest magistrate until he paid 10*l.* A writ of Habeas Corpus was then sued out, and the facts were stated in the return. But it was pleaded in evidence that the bailiff, being an officer, had a right to carry arms, and that he was therefore not within the statute 33 H. 8, c. 6, which prohibits "the carrying of any hand gun." This plea was allowed, and the officer discharged; but if the truth of that plea had been denied, it must have been traversable, for it would be absurd to say that any person might plead what he pleased in confession and in evidence, and that such plea must be taken as conclusive. In *Swallow's* ‡ *case*, he had refused to take the sacrament, so as to qualify him for the office of alderman, to which he had been elected, on which the court of aldermen committed him. It was allowed by this Court that they had such a right; but on a plea that he, as Master of the Mint, was exempt, he was discharged. In the year 1758, the remarkable cases occurred, which excited great attention at the time, of the men who were impressed in the Savoy, under the 18 G. II., c. 10. If the doctrine had then prevailed, which was now asserted on the part of the crown, that the

* See Introd., p. 22.

† 5 Co., 71; S. C., reported as R. *v.* Gardiner Cro. Eliz., 821.

‡ 1 Sid., 287.



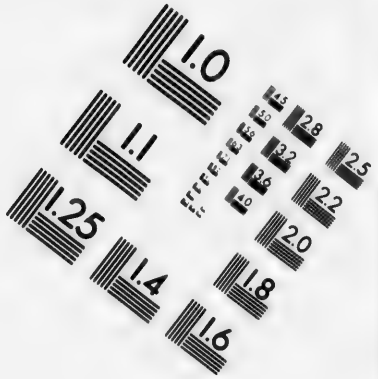
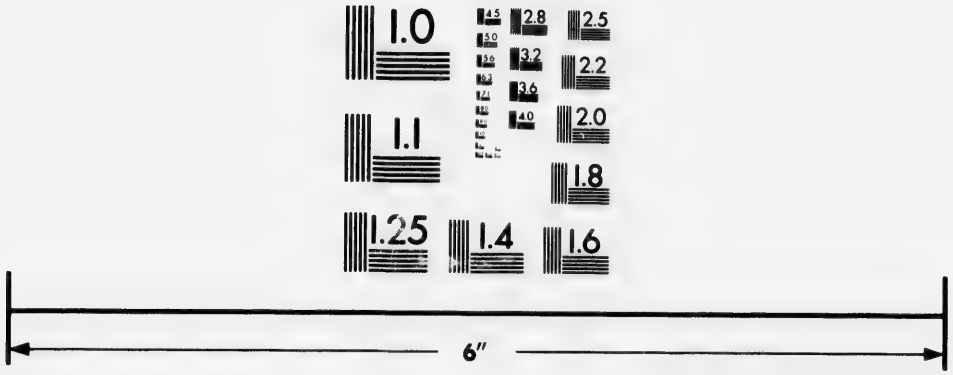
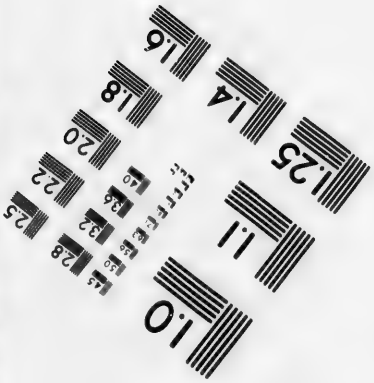
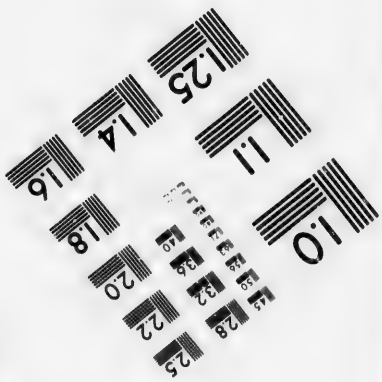


IMAGE EVALUATION TEST TARGET (MT-3)







Photographic Sciences Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

1859.
QUEEN
v.
BATCHELDOR.

return was conclusive, and that the only remedy open to the party imprisoned was by an action for a false return or false imprisonment, these men must have been sent across the ocean, with this solemn mockery of a remedy, which could never be exercised except when it was not wanted. A long account of the proceedings in these cases was to be found in "Dodson's Life of Mr. Justice Foster," extracted in the Addenda to Summersett's case, in the 20th vol.* of the State Trials. Mr. Justice Forte was decidedly of opinion that the returns ought to be liable to contradiction by affidavit, and expressed himself very forcibly on the delusive character of the remedy, then, as now, proposed to be afforded to the unhappy men illegally impressed. He said, "The man is taken from the Exchange, or from behind his counter, no matter whence, and thence to the Savoy, or aboard a tender: and if his friends happen to have time enough to procure a Habeas Corpus, a sufficient return to the writ is immediately made (there are precedents enough in the Crown Office, and they are soon copied), and the man is sent away, in due form of law, to take his chance, for some years perhaps, amidst the perils of the sea and the disasters of war. But it is said that he is not without a remedy. *What remedy? An action against a man perhaps not worth a groat. But how responsible soever the officer may be, what satisfaction in damages is equal to the injury? Or, if that were possibly to be had, what becomes of the action, if the plaintiff should be knocked on the head in the service? Why truly moritur cum persona. In short, he hath, in this view of the case, no remedy, unless you give him what I call the specific remedy, a right to controvert the truth of the return before it is too late.*" In the case of *R.* v. *White*†, this course was pursued. An affidavit had been made against Major White, for improperly impressing one Reynolds. "Affidavits were read on both sides, and the Court said that although it is not usual to enter into the truth of the facts set forth in the return to a Habeas Corpus, yet in this case, as the party

* P. 1374. † 20 State Trials, p. 1377, note.

1829
QUEEN
v.
BATCHELDOR.

using the writ hath no other remedy, it may be done; and that if Reynolds is not within the description of the act, the whole proceeding is a mere nullity, coram non judice." In consequence of the public attention being strongly directed to these cases, a bill to amend the Habeas Corpus Act was introduced into parliament, on the arrival of which in the Lords, they desired the opinions of the judges. Amongst the ten questions propounded to them in relation to the existing law of Habeas Corpus, the last was the following:—"Whether in all cases whatsoever, the judges are so bound by the facts set forth in the return to the writ of Habeas Corpus, that they cannot discharge the person brought up before them, although it should appear most manifestly to the judges, by the clearest and most undoubted proof, that such return is false in fact, and that the person so brought up is restrained of his liberty by the most unwarrantable means, and in direct violation of law and justice?" On this question, seven of the judges out of ten considered that they were not bound by the return, and that the allegations there might be investigated. C. J. Wilmot, who thought the return conclusive, and whose elaborate opinion is extant in his notes*, was not acquainted with the cases of *De Vine* and *Hutchins* v. *Player*, only recently† laid before the profession by the publication of Sir Orlando Bridgman's Judgments. Probably if the three dissentient judges had known of these cases, their views would have been different. At any rate the majority of the judges thought the Court *not* bound by the return‡. And it must be presumed, from the House of Lords throwing out the bill then brought in, that they were satisfied its provisions were unnecessary, as the law already allowed, according to the opinion of the judges, the parties to controvert the return. Some years afterwards, in the 18 Geo. III., *in Goldswain's case* §, a bargeman had been impressed as he left the king's docks. This was said by the judges to be a flagrant and oppressive case; and on their intimating that to the counsel of the Admi-

* Judgments and Opinions, p. 107. † 1825. ‡ 15 Parl. Hist., 898
§ 2 Sir W. Bla. Rep., 1207.

1839.

QUEEN
v.
BATCHELDOR.

ralty, it was abandoned. But that great judge, Mr. Justice Gould, was of opinion that neither the Court nor the party was bound by the return to the writ of Habeas Corpus, but that, in pleading any special matter necessary to be inquired into, it should be investigated and examined accordingly. Mr. Hargrave, in a note to his report of his argument in the case of Summerset*, has quoted a passage to be found in his Jurisconsult Exercitations†, to this effect:—"In the Habeas Corpus the return cannot be contested by pleading against the truth of it, and consequently on a Habeas Corpus, the question of liberty cannot go to a jury for trial,—though indeed the party making a false return is liable to an action for damages, *and punishable by the Court for a contempt; and the Court will hear affidavits against the truth of the return, and if not satisfied with it, restore the party to his liberty.*" In this doctrine, as far as regards the pleading, Mr. Hargrave had followed the common opinion, ignorant of the older and better precedents now referred to—but even he said the return might be controverted *by affidavits*, and the gaoler punished for contempt. It was incumbent, according to the principle of the writ of Habeas Corpus, that the gaoler should verify his statements. At any rate it was open to the prisoners either to plead to the return or contradict it by affidavits. He therefore claimed that right. But the present motion was for an attachment against the gaoler for placing on the files of the Court a false return, and which must have been false to his own knowledge. The warrant by which he alleged Watson was detained, when the name was omitted in the mandatory part, was in his possession; and its contents must have been known to him. He therefore moved for an attachment against Mr. Batcheldor.

LORD DENMAN, C. J. Upon the return, which was read some days ago, and on which we pronounced judgment this morning, I understand Mr. Hill to make two motions, or rather one motion with an alternative. In the first place, he contends that the truth of the return as it now stands, ought to be sup-

* 20 State Trials, p. 88, note. † Vol. i., p. 22, note.

ported by some affidavit; and in the second place, Mr. Hill produces an affidavit on which he grounds an application for an attachment against Mr. Bacheldor for a contempt of the Court in making a false return. With respect to the first motion, there seems no kind of authority for saying that in any instance whatever it has been held necessary to support a return by any affidavit, and I do not find that in practice it has ever been done. It therefore appears to me we should not be justified in introducing any new practice, or in saying that now, for the first time, it will be necessary that the party who makes the return should verify it also by any statement on oath. There are certain other securities provided by the law, and if that law should unfortunately be found insufficient for the protection of those for whom it was enacted, that is their misfortune, but will not authorize the judges of this Court to introduce an altogether novel practice on this subject. With regard to the motion for an attachment against Mr. Bacheldor on the ground of his having made a return false within the knowledge of the party making it, the application rests upon this statement, that the return handed to the Court stated that Sir John Colborne, by letters patent, directed the captain of the bark to carry over Leonard Watson to England, for the fulfilment of the condition on which the pardon was granted. Upon looking at the warrant, which in the first instance was shown either to Watson or the attorney who attended on his behalf, it appears, although the letters patent enumerated the names of all the parties, and amongst others the name of Leonard Watson, yet in the operative part there is no direction to carry Leonard Watson to England; the names of the others are mentioned, but his does not appear, so that there is clearly an inconsistency between that fact and the statement on the return, that the warrant directed him to be carried over. When brought before us upon this affidavit, it does not appear to authorize the bringing over of Leonard Watson. That individual has therefore a right to say, "You have not only imprisoned me on a return which I have ques-

1839.

QUEEN v. BATCHELDOR.

tioned, but upon a warrant which you have falsely laid before the Court, inasmuch as you say that it includes every name, whereas I am prepared to show that it does not mention my name." The Court ought to be extremely careful, whenever it has the means of ascertaining the truth of facts, that the fact shall be truly stated, and without at all entering into the question whether that warrant be material to the justification of the party, or whether the judgment already pronounced does not dispense with it, I am of opinion that no such minute inquiry should be made on the subject; and that if we find that there is an untruth, it is a sufficient *primâ facie* case for us to call upon the party who has untruly stated anything, to account for his having so done. I am, therefore, of opinion that a rule nisi for an attachment ought to be granted.

MR. J. LITTLEDALE.—A person imprisoned has two modes of proceeding—one by bringing his action for false imprisonment against the party who has him in custody, the other by applying to a judge for a writ of Habeas Corpus. If he proceeds by action for false imprisonment, the party must either set out his ground specially in his plea, or, if allowed, in evidence; but either way he will be bound to prove the truth of all the facts put in issue, and a person in the circumstances of the gaoler of Liverpool would be bound to prove the truth of every fact. But not having so proceeded by action, the gaoler is not placed in that situation to be compelled to verify the truth of the matter. He has proceeded by applying for a writ of Habeas Corpus in a summary way; the judge granted that writ, the gaoler was called on to bring up his body to the Court, and account for his having him in custody. In this case we have held it to be not so material to specify all the matters with the same minuteness as in an action for false imprisonment. But then it is said, the return, at all events, should be supported by an affidavit. I do not find any instance to show that a party in the first instance is bound to prove the truth of the facts by affidavit. There is no precedent for that. I do not think that in a proceeding upon a writ of Habeas

Corpus, we can deviate from the usual course so far as to require that to be done which has never been done before. So much for that part of the motion calling on the gaoler of Liverpool to verify the truth of the return by affidavit. With regard to the other part of the application for an attachment against the gaoler for having made a false return, it is founded on this—that he has made a return, stating that Sir John Colborne, by letters patent, directed the master of the bark *Captain Ross* to convey Leonard Watson to Liverpool, and deliver him to such persons as should be authorized to receive him, for the purpose of carrying into execution his sentence of transportation to Van Diemen's Land. In the recital of the writ the name of Leonard Watson is mentioned, but in the mandatory part of the writ it goes on to say, "These are therefore to require you," i. e. Captain Morton, to "take A. B. &c., the persons enumerated, but among them there is no mention of Leonard Watson. His name is not there; and as this document was within the knowledge of the gaoler of Liverpool, as he must be presumed to have looked over the document under which he was to detain the prisoners, a rule nisi must be granted, calling on him to account for the circumstances under which he has put into his return that Sir John Colborne had directed Captain Morton to convey Leonard Watson to England, whereas Leonard Watson's name is not mentioned in the operative part of the warrant.

MR. J. WILLIAMS concurred.

MR. J. COLERIDGE.—I am entirely of the same opinion on both parts of the application. With regard to the first point, a rule has been granted, but it is only a rule nisi, the Court abstaining most cautiously from prejudging the merits of the question, and proceeding upon this ground, that wherever a public officer has made a return, which, *primâ facie*, appears untrue in any particular, it is necessary for him to account for it, and state why he has so dealt with the Court. The other point is, that it is necessary by affidavit to support the return. A great deal has been said in the first part of Mr. Hill's

1839.

QUEEN v. BATCHELDOR.

argument, by way of general observation, on the liberty of the subject, and the illusory effect of the writ of Habeas Corpus, unless the Court sustains the argument. Upon that subject I will merely say this, that on examination of the history of England, it will be found that that judge does best for the liberty of the subject, who does not indulge in speculations of his own as to what will be best for the people, to the extent of straining the law beyond what the law will permit, but who adheres to the law as he finds it written and acted on, however defective it may be; because, if it be defective, the evil is sure to lead to an improvement of the law in the regular and constitutional mode. Mr. Hill has no doubt argued the matter with great learning and ability; but the authorities do not sanction his position, which is, not that the truth of the return may in any stage be controverted, either by plea or affidavit, but that in the first instance the crown, or the party filing the return, is bound to support it by affidavit. There is not a single case, from the time of Henry VI. down to that of Mr. Hargrave, which, in the slightest degree, bears that out in terms. Indeed, the great current of authorities is the other way. Sir Michael Foster is to be taken as a very strong authority in this matter, for it is well known what his opinions were; and if he did not carry the point further than that the party controverting the return might file affidavits for that purpose,—if he did not go on to say that it was incumbent on the party making the return to support it by affidavits,—it must be taken that he had found no authority which could enable him to make that position good. So, then, thus stands the case on the authorities; but now it is contended, that although by the authorities the onus lies on the party controverting the return, justice requires that it should be shifted, and the onus thrown on the other side. That is a proposition in support of which no case can be cited, and the Court cannot go to such an extent. I therefore agree, that there is no ground for granting the first part of the application.

The ATTORNEY-GENERAL, SOLICITOR-GENERAL, POL-

1839.

QUEEN v. BATCHELDOR.

LOCK, SIR F., and WIGHTMAN, showed cause against the rule.

The inference attempted to be drawn, that Mr. Batcheldor knew of the omission of Watson's name in the warrant, and wilfully mis-stated it to the Court, was quite unjustifiable. The omission was a mere clerical error, and being in the mandatory part of the warrant, was immaterial. They showed cause on affidavits, which clearly exculpated Mr. Batcheldor from all wilful blame, and therefore at once relieved him from this rule. Mr. Blunt, and another clerk of the Colonial Office, stated that despatches had been received by Lord Glenelg from Sir George Arthur, transmitting a list of persons, pardoned on condition of transportation, of which Watson was one, and also the pardons and warrants, and that they verily believed the omission of his name in the mandatory part of the warrant was a clerical mistake. Mr. Batcheldor deposed, that when he received the prisoners, their names were called over to him by Captain Morton; that among them was the name of Leonard Watson, and a list containing that prisoner's name was also delivered to him on the occasion. He proceeded to say, that no document or other warrant was then produced, but that in the course of the day he received a warrant from the Town Clerk's office, purporting to be under the hand of Sir John Colborne, and to have the seal of the Province of Lower Canada; that he then read the warrant, and it was occasionally in his possession afterwards. The deponent then stated, that he brought the warrant, the writs, and the prisoners, to London; that he lodged the prisoners in Newgate, and delivered the papers to the agents of the Town Clerk of Liverpool. He further stated that he signed certain returns, which he understood had been prepared by counsel, and that he was not aware, until after they were filed, that Watson's name did not occur in each place among those of the prisoners; that the solicitor for the prisoners was in possession of a copy of the warrant; and that he, the deponent, had no intention to state anything as being in the warrant which did not appear there. The reason of withdrawing the first return and substi-

1839.

QUEEN v. BATCHELDOR.

tuting the second, was, that in the former Mr. Batcheldor alleged that he detained the prisoners under Sir John Colborne's warrant, which was not true, as on their arrival in England the virtue of that warrant became exhausted. There was also an affidavit of Mr. Maule, the solicitor to the Treasury who stated that he laid the papers before Mr. Wightman to draw the return, and that he did not advert to the circumstance that Watson's name was omitted in part of the warrant. It was clearly a mistake throughout. Indeed, it could not have been designedly done, for the trick would have been too stupid. A copy of the document was in possession of the solicitor for the prisoners, and therefore the fraud must of necessity have been at once detected. The rule, therefore, must be disposed of as against Mr. Batcheldor. But the effect of the error could not possibly benefit Watson. According to the cases referred to in the former argument, he must be detained, if the Court had reason to believe that he had been guilty of high treason. They should move to amend the return, according to the facts. This application, however, would have this good result. It would show the public that the writ of Habeas Corpus was not such a mockery of a remedy for the liberty of the subject as the counsel for the prisoners had endeavoured to make out. They at once freely admitted, that if a case of fraudulent tampering with a return could be established, the parties, however high their rank, might and ought to be visited with the severe displeasure of that Court which they had endeavoured to deceive. There was, therefore, a remedy, other than an action, open to persons injured by a false and fraudulent return. That, however, was not the case here, and therefore the rule must be discharged.

HILL, FALCONER, ROEBUCK, and FRY, supported the rule.

They joined in congratulation with the counsel for the crown, at the admitted summary remedy, which must now be considered established, afforded to parties injured by a fraudulent return. But the remedy must be extended even much further than to a *fraudulent* one, if the liberties of Englishmen were to be duly secured. Unless the party applying for a Habeas Corpus

was entitled to show that the return was false in fact, even although not wilfully so, he would be left with that mockery of a remedy—an action, when he was half-way across the Atlantic Ocean. But surely the law of England must have given other safeguards to the subject, which have made the writ of Habeas Corpus the topic of such great eulogy here and abroad. What was the position of the case now? The court had before them a return which, whether wilfully false or not, was, at any rate, clearly erroneous. Its credit, therefore, was impeached; and, considering the vital importance to the prisoners, ought to be considered altogether gone. In a material point, the judges saw that Mr. Batcheldor, wilfully or not, had misled them. The presumption, therefore, on which they had acted in assuming it to be correct, was found to be mistaken. The Court was deceived. But after such a glaring proof of carelessness (to give it the least blame), how could the court deal, on such a return, with the liberties of so many English subjects? Why, upon Mr. Batcheldor's own statement, the return could have no authority. He did not venture to say that he had ever read it. He appeared to think reading unnecessary—that he was not bound by the facts therein stated, because he said he was to consent to any alteration that might be approved of by the learned counsel who drew the return, and who might indulge the luxuriant imagination of a pleader in endless fictions. The return was, therefore, without the slightest authentication by the person making it; and even at the best, to what did it amount? Mr. Batcheldor having all his information at second-hand, trusting third persons, chose to convey it through the pen or mouth of another. All the information before the court on the return was mere hearsay. Surely it was not by such a document that the liberty of the subject was to be restrained. It had now been shown to the court to be a defective instrument, and they were bound in justice to the unfortunate men at their bar not to transport them, some for life, and others for a considerable portion of their existence, on a document which at best was only grounded on hearsay information, but which,

1839

QUEEN v. BATCHELDOR.

Judgment on the motion for an attachment

now proved to be erroneous in an important particular, had lost all credit, and should be at once quashed by the court.

Lord DENMAN.—This is a motion for an attachment against William Batcheldor, the gaoler of Liverpool, who has made a return to a certain writ of Habeas Corpus, by which he justifies himself for keeping in custody the body of Leonard Watson. It has been moved for, on the ground of his having been guilty of contempt, in misleading and deceiving the court, by falsely setting out the warrant by which he received the body of Watson: and I believe that if there had been anything like wilful falsehood in this matter, and that this had been done for fraudulent purposes, the return would have been quashed, and the person who made it severely punished. I will allow, (and my learned brothers agree with me) that there has been a degree of neglect, culpable neglect, in making this return, and that the false statement renders it proper to visit the persons who made it with our displeasure. There is no doubt that the statement was untrue, and that it was incorrect to say that the letters patent of Sir John Colborne, which Bacheldor received, and described as the warrant by which he keeps Watson in custody, in the mandatory part, required the captain to bring the prisoner over from Quebec to that particular part of England, viz. Liverpool. In the first place, I do not think the person making out the return was free from blame in receiving the body of a person, when, in the mandatory part of the warrant, he was not instructed to receive him. On the contrary, it was the bounden duty of a gaoler not to receive the body of any person without being first satisfied that he had lawful authority to do so; and I cannot pass over, without some degree of censure, the circumstance of Bacheldor detaining Watson on a warrant, in which the name of that person never once occurred. In criminal proceedings, such a mistake would be attended by most dreadful consequences; and when any person is intrusted with an office which controuls the liberty of his fellow-subjects, he ought to take care not to controul that liberty without being fully convinced, and without taking the proper means of seeing, whether he has authority to do so or

1859.

QUEEN v. BATCHELDOR

not. That, however, is not the point now in question—not the contempt for which we are to punish Batcheldor; this motion has not been brought forward on account of Watson's having been improperly imprisoned; but we are to decide whether Batcheldor has not unduly trifled with justice and the authority of the court, because he said in his return that he had received this man under the warrant of Sir John Colborne, when he did not really examine the warrant to see if he was so authorised. Whether the warrant was material or not, is not decisive of the question whether the party making the return can be charged with contempt of court in saying what was false; but in a subsequent part of the case, the affidavits of Batcheldor and others, which have been read to the court, set forth the reasons by which he had been misled, and make everything appear so satisfactory, as for it to be impossible, when those reasons are considered, to impute to him any such intention, or of treating the court with contempt in making a false return. There can be no doubt that he fully believed he was doing right, and that he was authorised by the warrant to detain the prisoner. I think Batcheldor ought to have made himself more sure on the subject; but when he found a long list of names set forth in the letters patent of Sir John Colborne, with the name also of Leonard Watson in the introductory part of the warrant, although not in the mandatory part, it seemed possible, without any other blame than that of want of carefulness, that he should have overlooked the omission of the prisoner's name in the mandatory part of the warrant. I, therefore, cannot conceive that Batcheldor stands before us in such a condition as to justify treating him with such severity for contempt as has been mentioned by the learned counsel. I cannot help just adverting to what has been much dwelt on—the supposed blame imputable to the individual who committed this error, for such it certainly was; and as to that objection, although I agree that the Attorney-General and his coadjutors had nothing to do with it, except that the gaoler should have seen that the warrant stated the facts in general terms, yet there is no doubt that the counsel who drew up the return had probably copied only the

1839.

QUEEN v. BATCHELDOR.

first name, and then left it to some other person to fill up the blanks with all the other names; but at the same time, I do think there was great neglect in some quarter or other in not comparing one document with another, so as make it a complete copy of the statement of the warrant. I cannot feel that this is to be passed over without blame, because the court has a right to expect that no document shall be brought before them stating that Watson was to be imprisoned in England, without some person being called upon to answer, and be responsible for Sir J. Colborne's warrant containing that requisition. With respect to the materiality of the warrant, the court has, on Monday last, said, that it was in no degree material as to the ends of justice in imprisoning Watson; and it would not become the court to argue in defence and vindication of a judgment to which they have given their most anxious and deliberate consideration, under a deep sense of their responsibility to the country. It would be unworthy of the trust and confidence reposed in us, in the discharge of which we have pronounced that judgment which we are satisfied is consistent with law and justice. It is unnecessary to enter into the question what more might be done on the occasion; I neither assent to nor dissent from, any of the propositions laid down on the subject in any respect; and am not prepared to say that if Watson, or any of these men, had pledged his oath in affidavit, that any part of these matters was not true, whether he could make it the foundation of any proceeding for wilful impropriety or not: whether a foundation of any proceeding to quash the return or not.

But also I am not prepared to say, that if the falsehood of these matters could be shown in any way, the court would not be induced to give the person the opportunity of having that distinctly proved, and that, therefore, the Habeas Corpus should not have been so treated as it has been, as if it were a weapon to protect the subject which proved powerless, or as if the judges of the land had been guilty of some fraud and collusion, in putting that forward as a real protection, which is said to turn out to be nothing but a subject of undeserved

1839.

QUEEN v. BATCHELDOR.

panegyric. Still it appears to me, in a case of this peculiar kind, for which it is likely no precedent can be found, that even if the remedy had entirely failed, still the provisions made by the law for the liberty of the subject have been found for ages effectual to an extent never known in any other country, through the medium of the summary right given by means of the writ of Habeas Corpus. But even in this case I am not prepared to say, where there is that statement before us, to which we gave entire credence, of the legal proceedings which authorised the imprisonment of Watson, if any part of those proceedings could be impeached by the party in prison as untrue, that there should not be full inquiry, and the means of bringing out the truth. As to the amendment, it clearly follows from what I have said, that it would be fit that it should be made, not for the purpose of varying the nature of the case, because the return was sufficient without it, but on the ground on which the court has granted the rule, that it is not fit or decent that any falsehood should appear on the face of a return filed in this court.

MR. J. LITTLEDALE.—The question more particularly before the court, is the rule moved for, calling upon Mr. Bacheldor to show cause why an attachment should not issue against him for contempt of court. He has certainly made a return which, in point of fact, was not true, and that is a justification for us to inquire whether it was true or not, and if it were not, whether we ought to grant an attachment against him. It appears that the statement was not true in point of fact, and it, therefore, lay on him to show that it was owing to some mistake, some misconception, or something to protect him from the proceedings of the court against him. From the affidavits it appears, that there was a mistake, arising from one in the warrant of Sir John Colborne, for the name of Watson, although mentioned in the first part, was omitted in the mandatory part of that warrant. The prisoner, however, was delivered by Captain Morton to Batcheldor, under the authority of the magistrates, and at the time he had not seen the warrant, although it was afterwards delivered to him in the course of

1839.

QUEEN v. BATCHELDOR.

the day, and given by him to the town-clerk. He ought to have seen it, but he had consequently little opportunity of perusing it; and as he has acted under no wilful intention to deceive the court, it appears to me that he has exculpated himself, and that the rule for an attachment ought therefore to be discharged. As to the other parts of the case, I will not enter into them, as the judgment of the court has been given on them before. It is sufficient to say, that the warrant was not at all material, because if these persons were, under a Canadian Act, under sentence of transportation, it was competent for the governor of Upper Canada to send them to England without any warrant at all. The warrant certainly does not appear to have been drawn up in a very business-like manner, but that is not material to the question, whether the prisoner should be remanded or not. The amendment ought to be made, so that there may not be a return known to be false on the file.

MR. J. WILLIAMS.—The observations which have been already made on this subject confine the questions for consideration within a narrow compass. The first is, whether an attachment should be issued against the gaoler of Liverpool? It may perhaps be admitted that the learned counsel in favour of the rule was correct in his remarks, that it was not how far Watson might or might not be affected by the error in the return, but I agree with him that the question really is, whether in so doing there has been an abuse of the process of the Court, and an attempt to treat the Court with contempt and disobedience? But, upon the discussion of the question, whether or not it was that the facts in the affidavits supersede all comment, yet the learned counsel (Mr. Hill) has declined to enter into that which was substantially the main question, viz., whether this was a wilful error or not, and which the learned counsel said he left for the decision of the Court. If that be so, he is retreating from the question. Why, before punishment is awarded, the Court must be satisfied of there being an intention to treat it with contempt. When we examine the facts, what reason is there for saying that? The Court does not rest

1839.

QUEEN v. BATCHELDOR.

simply on the affidavits which state that Batcheldor was utterly ignorant of the error until the motion was made, but in his conduct in other respects. What has been his conduct? Did he volunteer to take possession of the prisoner and abridge him of his liberty? Not at all; for, by the affidavit, it appears that Batcheldor has acted under the immediate authority of the mayor and magistrates of Liverpool; and therefore I think there is nothing to show that he has gone too far, to show he was a zealous partisan to deprive this man of his liberty.

But it has been said by another learned counsel (Mr. Roebuck), that in proportion as the Court attributed to Batcheldor all verity, all knowledge, and all certainty, that he knew things at a distance as well as those before him, it is incumbent to watch him with a double degree of scrutiny. I will not, however, enter into the consideration whether that be new or not. The opinion of the Court has been given, and I think it will be found that General Pitt, when he made his return of what occurred at Gibraltar, being in England, was not more cognizant of the facts than Batcheldor was of what occurred in Canada. Novelty in this case there is not; and if so, it comes shortly to this—whether the party was ignorant of the facts stated in the return, or whether he has mis-stated them for the purposes of positive wilful fraud? I think that the latter was not shown, and that the rule ought, therefore, to be abandoned. As to the amendment, I am of opinion that it should be made.

MR. J. COLERIDGE.—I entirely concur in the decision which has been expressed by my learned brothers on the two points for the consideration of the Court, and I almost entirely agree with them in their reasons also. Many irrelevant topics have been gone into, and I do not think we have at present to do with the conduct of the gaoler as to receiving Watson. I do not consider that the question depends on the materiality or immateriality of Sir John Colborne's warrant, for the point on which this rule turns, founds itself upon a criminal and fraudulent return, and contempt thereby practised by the gaoler. The question of materiality of the warrant is not important,

1839.

QUEEN v. BATCHELDOR.

nor whether the false return went to prejudice Watson or not. I do not say the gaoler was free from blame, for he ought to have been more careful in making his return. But it appears that it was brought to him, and he signed it immediately, not in any degree aware of its inaccuracies; this stands so uncontradicted and confirmed by the facts of the case, that I have not the slightest hesitation in saying that the rule should be discharged. If, on the other part of this proceeding, a criminal intention is imputed to him, it is saying that he would sign or swear to anything, and is not dealing with him with the same justice as is prayed for by the other side. I am, therefore, of opinion that there is no foundation for this application. As to the second point, of amending the return, I think it should be granted in furtherance of the truth of the case; but it should be seen that it would not prejudice Watson. Whether the warrant was material or not, it is enough to say, that it does not prejudice any ulterior remedy which the prisoner may be advised to adopt; and in this point it seems worthy of observation, that the Court have offered the Counsel for the prisoner an opportunity of learning whether he wished to state any new facts. I think, therefore, the amendment should be made.

Application to the Court of Exchequer for a writ of Habeas Corpus.

On the 24th January, ROEBUCK applied to the Court of Exchequer for a writ of Habeas Corpus, to bring up the bodies of Parker, Wilson, Brown, and Watson, on an affidavit of Mr. Waller, clerk to Messrs. Ashurst and Gainsford, the solicitors for the prisoners, which stated that he had applied on their behalf to the gaoler of Liverpool, for a copy of the warrant under which they were detained, and had received the copy annexed, and also on an affidavit of Mr. Ashurst, stating that it was recited in the warrant that the prisoners had been convicted of treason, which statement he believed to be untrue, and that they had never been tried by any Court of law. ROEBUCK referred to the case of the *Hottentot Venus* *, to show that it was not necessary to support such an application by an affidavit of the party confined.

* 13 East, 197.

1839.

QUEEN v. BATCHELDOR.

But the Court said, "that there a reason had been assigned or not producing an affidavit from her. Before granting a Habeas Corpus to remove a person in custody, we must ascertain that an affidavit is not to be reasonably expected from him. An affidavit was here absolutely necessary from the person who claimed the writ, or from some other party, to satisfy the Court that they were so coerced as to be unable to make it."

Accordingly, on the following day, ROEBUCK renewed his application, on the affidavits of the four prisoners themselves, stating that they had never been arraigned, tried, convicted, or sentenced by any Court in Canada or elsewhere, and that they were wholly ignorant of the term for which they were detained. Although in *Sir John Hobhouse's case** it was laid down that the writ did not issue of course, but that the Court must exercise a discretion upon it; yet here they found the prisoners detained, under a warrant of Sir John Colborne, of which the force was spent on their arrival in England, and which could not authorise the detention of any person here, and which contained untrue allegations as the grounds on which it proceeded. That must be enough to constitute a *primâ facie* case, and call on the party detaining them to show good cause to the Court for his act.

The Court granted the writs, as doubt had been thrown on the validity and legal operation of the warrant. Lord Abinger observing, that he wished it nevertheless to be distinctly understood as his opinion, that when a man is detained under a certain warrant, he is not to be at liberty to question the truth of the statements in that document.

On the 28th January, HILL, FALCONER, ROEBUCK, and FRY, moved for the discharge of the prisoners; and their motion was resisted by the ATTORNEY-GENERAL, the SOLICITOR-GENERAL, Sir F. POLLOCK, and WIGHTMAN. [The arguments were substantially the same as in the Court of Queen's Bench, and therefore both have been reported as one].

* 3 B. and A., 420.

1839.

QUEEN v. BATCHELDOR.

Judgment.

In Easter term, 1839, 6th May, LORD ABINGER delivered the judgment of the Court of Exchequer as follows:—This is case of a Habeas Corpus to the gaoler of Liverpool, on the return to which a motion has been made to discharge the prisoner. The Court is bound to look at the substance of the return; if it contains sufficient matter in substance to show that the prisoner is lawfully detained, we cannot discharge him upon Habeas Corpus, though the return should in some respects be informal, or should go into matter not essential to the question. The return then in substance is this—that by an act of the legislature of Upper Canada, the lieutenant-governor, by the advice of the executive council of that province, was enabled to grant a pardon under the great seal, upon such terms as might appear proper, to such persons then under charge of high treason committed in that province as should petition the lieutenant-governor before their arraignment, praying for pardon, and that the same act provides that in case any persons should be pardoned under that act upon condition of being transported or banishing himself from that province either for life or for any term of years, such person if he should return to the province before the period of his transportation or banishment, should be guilty of felony and liable to suffer death; that after the passing of that act, the prisoner was duly indicted at a special Court of Oyer and Terminer, held by authority of another act of the same legislature, for the crime of high treason; that before his arraignment, in accordance with the statute, the prisoner petitioned the lieutenant-governor, confessing his guilt of the treason charged against him, and praying that her Majesty's pardon might be extended to him upon such conditions as the lieutenant-governor, by and with the advice of the executive council, should see fit; that the lieutenant-governor did, with the advice of the council, consent that her Majesty's mercy should be extended to him upon condition that he should be transported and remain transported to her Majesty's colony of Van Diemen's Land for the term of fourteen years next ensuing the date of his arrival at Van Diemen's Land, to

which terms and conditions the prisoner assented, and therefore the lieutenant-governor did, by letters patent under the seal of the province, remit and release the prisoner from all and every punishment that might be inflicted upon him by reason of the said treason so confessed, upon the condition, nevertheless, that he should be and remain transported for the term aforesaid. The return then states, that there being no means of conveying the prisoner directly from Upper Canada to Van Diemen's Land, it became necessary to convey him first to Quebec, in Lower Canada, and then to England, for the purpose of transporting him to Van Diemen's Land, and that accordingly he was transmitted by authority of the lieutenant-governor of Upper Canada to Quebec, and thence, by authority of the executive government there, which issued letters patent in the name of her Majesty to command that the prisoner should be delivered to Digby Morton, the master of the bark *Captain Ross*, to be by him conveyed to England, to such place as her Majesty should think fit, to the end that he might thence be transported to Van Diemen's Land; that Digby Martin accordingly brought him to Liverpool, the same being the place which seemed fit to her Majesty, and which was the most proper place for the purpose, and there delivered him to the gaoler of Liverpool, who retains him in his custody whilst means are preparing to transport him to Van Diemen's Land. This is the substance of the return, against which many ingenious objections have been urged, the principal of which seem to be, that the legislature of Upper Canada had no authority to make any such law; that if they had, it could be binding only within the precincts of that province; that it could communicate no authority to any person out of that province, and therefore could give none to the gaoler of Liverpool; that even if it could have that effect, the pardon granted under that law being conditional, it was not competent to the prisoner to accept a pardon, whereby he submitted himself to imprisonment or transportation, or that if it were competent to him to accept a pardon with such a condition, he has still a right to retract his consent, and to be set free from the obligation imposed upon him by the condition.

1839.

QUEEN v. BATCHELDOR.

All these topics have been elaborately argued on both sides and have received due attention from the Court; but in the view which we take of the case, we do not think it necessary to pronounce any opinion upon them. If the condition upon which alone the pardon was granted be void, the pardon must also be void. If the condition were lawful, but the prisoner did not assent to it, nor submit to be transported he cannot have the benefit of the pardon; or if, having assented to it, his assent be revokable, we must consider him to have retracted it by this application to be set at liberty, in which case he is equally unable to avail himself of the pardon. Looking then at the return, the position of the prisoner appears to be this, that he has been indicted for high treason committed in Canada against her Majesty; that he has confessed himself guilty of that treason; that he is liable to be tried for it in England; that he cannot plead the pardon which he has renounced; and that he is now in the custody of the gaoler of Liverpool, under such circumstances as would justify any subject of the crown of England in taking and detaining him in custody until he be dealt with according to law. Any subjects who held him in custody with a knowledge of the circumstances would be guilty of a crime in aiding and assisting his escape, if he be permitted to go at large without lawful authority. How then can we order the gaoler of Liverpool, or any other person who has him in custody, with knowledge of these circumstances, to let him go at large? If the prisoner cannot be lawfully transported under his present circumstances, it is to be presumed that the government, upon being so certified, will take proper measures for prosecuting him for the crime of treason in England. For these reasons, we are of opinion that the prisoner must be remanded.

THE END.

LONDON:
BRADBURY AND EVANS, PRINTERS, WHITEFRIARS.

ed on both side
ourt; but in th
hink it necessar
e condition upo
void, the pardo
lawful, but th
be transported
or if, having as
ust consider hin
set at liberty, it
lf of the pardon
of the prisoner
for high treason
hat he has con-
liable to be trie
don which he ha
of the gaoler o
uld justify any
l detaining him
to law. Any
owledge of the
in aiding and
t large without
the gaoler of
n custody, with
go at large?
nder his present
vernment, upon
for prosecuting
these reasons,
nanded.